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No. 170.

In the Supreme Court

OF THE UNITED STATES.

MARTIN BASKET, APPELLANT,

vs.

MILAS J. HASSELL,
Adm'r of Hillery M Chaney, dec'd, } APPELLEE.

APPELLEE'S BRIEF.

ASA IGLEHART,
JNO. E. IGLEHART,
Counsel for Appellee.

A. C. ISAACS, Law and Brief Printer, Evansville, Ind.

IN THE

Supreme Court of the United States.

MARTIN BASKET, APPELLANT,
vs.
MILAS J. HASSEL,
ADM. HILLERY M. CHANEY,
Deceased, Appellee.
In Chancery.

Statement of the Pleadings.

This is a bill in chancery by the administrator of Hillery M. Chaney, late of Sumner County, Tennessee, against Martin Basket and the Evansville National Bank, its President and Cashier, and the attorneys of defendant, Basket, are nominal parties, but simply as the custodians of a paper which is the subject of litigation.

THE BILL—(Original Record, pp. 2 to 8).

Alleges that the decedent, residing in Sumner

County, Tennessee, on the 8th day of September, 1875, deposited in the bank of defendant corporation $23,514 70, for which he took a certificate of deposit payable to himself, and which is set out. That in January, 1876, he died suddenly, and that subsequently the complainant was duly appointed his administrator, and that upon inquiry for assets he discovered that the said certificate was in the possession of the defendant Basket, who claimed to hold the same as a gift; but the complaint alleges that it is not a gift, but that the defendant, through a fraudulent combination with one Bryan and his wife, a neice of decedent, with whom he lived, and who claimed, since his death, the farm of decedent, under a pretended olographic will, said defendant Basket, who was also a nephew of the decedent, obtained fraudulent possession of said certificate from said decedent, who was an old man seventy years old and of feeble health and mind, without consideration and without any gift or other legal transfer thereof. An amendment (Rec. 65–69) alleges that decedent for seven years prior to, and at the time of his death, was a man of unsound mind, and was incapable of making a valid gift or other disposition of said certificate so as to defeat the claims of the administrator or his creditors. Prayer for a decree directing a surrender of the certificate and the payment of the money to complainant.

THE ANSWERS AND CROSS BILL

(Rec. p. 16 to 36.—Rec. p. 30 to 37.)

Admits the formal allegations of the bill and denies most of the substantial allegations, but admits the possession of the certificate and claims that sixty

days before the death, the decedent being in the possession of all his mental faculties, and with the intention to *give* said certificate to said defendant Basket, wrote and signed upon the certificate the following endorsement, viz: "Pay to Martin Basket, of Henderson, Ky., and no one else, then, not till my death, my life seems to be uncertain, I may live through this spell, then I will attend to it myself. H. M. Chaney." And thereupon delivered the same to said defendant, Martin Basket, who had ever since remained in possession of the same till he delivered the same to defendants, Shackelford and Richardson, and that the decedent never recovered from his sickness.

The answer also admits that there was a pencil will found in a blank book giving the farm to Mrs. Bryan, and alleges that the gift of the certificate to him was in trust as well for his brothers and sisters as himself, at his option.

The bank and its officers answer asking to be protected in the payment of the money, etc.

Basket filed a cross bill setting up the gift as in the answer, to which an answer traversing the main allegations was filed by complainants. (Rec., 39 to 46). This answer also insists that the cross bill is without equity, being insufficent, not showing, if true, that the defendant (cross-complainant) is entitled to hold the certificate as a gift. Bayard, Ries and the bank also answer the cross bill of Basket and the original bill of the complainants. Exceptions were taken to the answer of Basket and reserved to the hearing. General replications to all the answers com-

plete the issues upon which the testimony was taken. Upon the final hearing upon the testimony there was a finding and decree in favor of Hassell upon all the issues against not only Basket but all the other defendants

THE APPEAL

Is prosecuted by Basket alone. At the last term, upon a motion to quash the citation and service, and dismiss the appeal for defect of parties, the Court awarded a new citation, and reserved the motion to dismiss for want of parties till the hearing of the appeal. The brief of counsel upon this point are still in the record and appellee still insists upon the motion, but has nothing to add to the brief on file. But as the clerk says, there is a deficiency in the number of briefs on file, we repeat here the part of the petition and brief relating to this point as follows: "Said appellee, further moves the Court to dismiss said appeal for the further and other causes, to-wit: There is a defect of parties to the said appeal in this, the original suit as shown by the bill and amended bill, and the several answers was a suit in equity by the appellee against said appellant, as the holder of a certain certificate of deposit issued by The Evansville National Bank, and against Shackelford and Richardson, as his attorneys, having the manual custody of the paper, to restrain its transfer and impeaching the appellant's title and asserting title in the appellee, against the Bank and its officers, inhibiting payment to the appellant of the money evidenced by the certificate, and praying for a final decree against the appellant for the surrender of the certificate, and against the Bank for the

payment of the money; and this final decree was rendered according to the prayer of the bill. The Appellee therefore insists, that this decree cannot be reviewed upon appeal, without the presence before the Court of all the parties jointly affected by the decree. Yet the appeal is the appeal of Martin Basket alone, and the only citation on file, or ever pretended to be issued, was directed to Miles J. Hassell, appellee, alone, and no proceeding by summons and severance, or otherwise, were ever had to bring the co-defendants of the said Basket into court, and subject them to its jurisdiction.

"And said appellant further prays, that as said appeal and said record show, the appellant filed a cross bill against the appellee and said Evansville National Bank, and said Bayard, its President, and said Reis, its Cashier, wherein he claimed and set up title to said certificate of deposit, and sought to recover the money thereby evidenced from the bank in the same suit. The same issues were formed as upon the original bill, and a final joint decree of dismissal of the cross bill was rendered in favor of all the defendants thereto and against the appellant. The appeal seeks to review this decree, but no one but said Hassell is in any way made a party to said appeal; or brought under the jurisdiction of this Court.

"Wherefore, this appellee prays a dismissal of said appeal."

1. The rule is uniform, that where a writ of error or appeal is presented from a joint judgment or decree, all the parties thereto must join in such writ

or appeal, or there must be a summons and severance, or its equivalent proceeding, showing a refusal to join by any person who does not join. The reason assigned is two-fold: (1.) That the successful party may not be delayed in enforcing his remedy against any one not seeking or desiring a reversal; (2.) That the appellate court shall not be called upon in several suits to pass upon the same questions several times. Masterson vs. Herndon, 10. Wall., 416, and authorities cited; Hampton vs. Rouse, 13. Wall.. 187; Simpson vs. Greely, 20, Wall., 152, and authorities.

2 Another rule of parties in appeals and which is but the converse of the one already stated and is based upon the same reasons, is that inasmuch as no right of any party can be affected without his presence in court, all parties interested in maintaining the judgment or decree rendered below, should be made parties defendant or appellee in the proceedings for review upon such writ or appeal, and be cited to appear in the appellate court;

A failure to comply with these rules will be visited by dismissal of the appeal or writ of error, as the case may be, as appears by all the cases above cited.

(1.) Then, under this head, although the decree against the appellant and the bank and its officers, is not literally joint, yet in its legal effect it operates upon them all alike. The bill seeks in the same suit to establish the right of the complainant in equity to the possession of the certificate of deposit and the money therein represented, both as to the

holders of the certificate and the payer thereof, and to recover the money due thereon. The finding of the Court upon the question of title to the certificate and the money is in favor of the complainant below and against all the other defendants, and the decree following this finding is for the surrender of the certificate and the payment of the money. This decree affects and binds all the defendants to the bill. Can the Court relieve Basket by reversing the judgment as to him so as to be available to render the payment of the money to the complainant under the decree by the bank wrongful, without the presence of the bank here? The decree directing the payment of the money by the bank settles the right and renders the same *res judicata*, unless reversed on appeal, to which the party required to pay is a party. This must be so; and the result of this appeal must be unavailing, for the Court would not consider a decree *piece meal*, so to speak, and reverse the same in favor of appellant, when the reversal could not affect the title of the party holding the money under title derived from the payment by the bank under an unreversed order of the Court for its payment. The case, therefore, being within the spirit of the rule forbidding the taking of appeals by one of two persons jointly affected, this Court must, under the authorities dismiss the appeal for want of the joinder of the bank, or some excuse for the non-joinder.

(2.) But there is another view of the case equally conclusive of the motion. The final hearing upon which the final decree was rendered, was upon the

original bill, answer, exhibits, replication and evidence, and the cross bill, answers, exhibits, replication, and the same evidence. The original bill was by Hassell, Administrator, against Basket and his attorneys, and the bank and its officers In the former, Hassel claimed the certificate of deposit, which was the subject of controversy, and sought to recover the possession of the certificate from Basket and the money from the bank, while in the latter, Basket sought to establish his right to the certificate and recover the money due thereon. The same issues were formed in the cross bill as in the original bill. Both sets of issues were settled in favor of Hassel. The cross bill was dismissed. This was a final adjudication against Basket, and against any claim to the money or certificate, and in favor of all the defendants to the cross bill jointly. Without a reversal of the decree upon the original bill would be unavailing. The appellant is forever barred by the decree, but how can this decree dismissing the cross bill be reversed without the joinder in the appeal of all the joint parties? What avail would a reversal of the decree be as to Basket? Suppose the payment of the money had been superceded, and upon this appeal the decree reversed as to Basket, could he, upon such a reversal compel a payment of the money by the bank, over an unreversed decree for its payment to Hassell, and dismissing Basket's cross bill, claiming payment from the bank? Certainly not. The case at bar is upon both grounds, clearly within the ruling of the class of appeals and errors, which will be dismissed to prevent

more than one hearing in the Appellate Court to determine a single question.

It is said by this Court in substance, that an appellant cannot ask a reversal of a decree which any party is interested in maintaining, and whom the appellant might have, but did not join as appellee. (Terry vs. Abraham, 3. Otto. 38.) It therefore follows as a logical sequence, that when an appeal seeks only the reversal of a decree which others, not made parties, are interested in maintaining, the appeal must be dismissed.

The appeal should be dismissed for all the reasons assigned.

Learned counsel for appellant insist that the Bank and others are not proper parties, but as the relief sought could not have been had by Basket had he succeeded without their presence, we deem argument unnecessary. The cases cited in answer to our argument show that while there may be appeals without the presence of all the parties, yet none of the cases are like the one at bar. And the Maryland case specially relied upon is directly in point in our favor.

QUESTIONS PRESENTED BY THE RECORD UPON THE MERITS.

The record presents *three* questions; *one* purely of law, the other *two* mixed questions of law and fact.

The question of law relates to the effect of the transfer of the certificate. The mixed questions are: First, conceding that the endorsement was effectual to transfer the title of the certificate as a

good *donatio causa mortis*, was it given in the last sickness in expectation of death, then imminent; and secondly, whether all things else concurring, the deceased was a *person of sound mind* at the time of the alleged gift so as to enable him thus to prevent the regular succession of his property to those who by law would otherwise have been entitled to the same.

MODE OF EXAMINATION PROPOSED.

We propose to present and examine these questions in the following order and manner: 1. To discuss the questions of law and cite the authorities sustaining our view. 2. To make such abstracts of and references to the testimony bearing upon the several questions of fact as to develop the same, and add such suggestions by way of argument as shall aid in reaching the proper construction of the evidence, and also to make such quotations from and references to authorities, legal and medical, as shall fully elucidate our view both of the law and the evidence upon the mixed questions. And 3. To answer such arguments and authorities cited by counsel for appellant as we shall deem it proper to notice.

We come directly to the inquiry: What is the character and effect of the indorsement under consideration? Will such an indorsement and delivery in apprehension of immediate death where the donor dies in the same sickness, be effectual to pass the property in the certificate, and to the money evidenced thereby to the donee? These inquiries we answer in the negative.

An accurate definition of a *donatio causa mortis* is very difficult; indeed one which shall even approximate the current of authority, is almost impracticable, simply because the *current* is *devious*. Mr. Schouler, in his work on personal property, defines it as, "*a gift of personal property in expectation of death then imminent, carrying the essential condition that the property shall belong fully* (irrevocably) *to the donee in case the donor dies as anticipated, leaving the donee surviving him, and the gift is not meantime revoked, and not otherwise.*" (2 Schouler on Personal Property, 122 and note.)

Ch. J. Woodard, of Pennsylvania, defines it thus: "A gift of a chattel made by a person in his last illness or in *periculo mortis*, subject to the implied condition that if the donor recover or the donee die first, the gift shall be void. 11 Harris, Penn. 59, 51 Penn. st. 350.

We make no question that under the proper conditions a certificate of deposit, like the one in controversy here, may be the subject of a *donatio causa mortis* by indorsement and delivery, and even by delivery without indorsement. The ground upon which we assume the invalidity of the alleged gift on account of the form of this indorsement, is based upon the theory that in such a gift although it is said to be ambulatory (subject to revocation,) yet the title, either legal or equitable, of the subject of the gift must actually pass in the lifetime of the donor to the donee, and become actually vested in him, or it is invalid.

The very definition of a gift is conclusive upon

this point; it is "The act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person who accepts it, without consideration. There must be a transfer made with an intention of passing the title, and delivering possession of the thing given." (1 Bouv. L. Dict., 560–561.)

Says Mr. Schouler upon this point: "* * * Any reservation which in effect takes back all that was given, or postpones the vesting of the title till the future, is not a gift." (2 Schouler 118.)

These authorities apply as well to a gift *causa mortis* as *inter vivos*, for whether a gift be made in contemplation of death or not, it is still a gift.

And so it results that the divesting of the title of the donor, and the investing the donee with the same in the former case, is just as essential as in the latter, for, says Sir John Leach, Master of the Rolls, in Duffield vs. Elwes (1 Bligh's Rep. N. S., 1 Sim. and St. 245, 1 Eng. Ch. 246) "Where delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causa*, because it will not prevent the property from vesting in the executors, and as a court of equity will not *inter vivos*, compel a party to complete his gift, so it will not compel the executors to complete the gift to his testators." It is true that formerly it was held upon this principle that where a *chose in action*, a bill or a note, was delivered as a gift, either *inter vivos* or *causa mortis*, without endorsement, the gift in either case would not be enforced, yet through the prevalence of equitable rules over legal rules in this re-

gard, this rule is now disregarded, and in both classes of gifts courts of equity will decree the donor in the one case, or his representive in the other, to hold the legal ownership in trust for him who has obtained the equitable title by delivery, holding simply what is a very familiar principle in code districts, that the transfer of negotiable paper by delivery, without endorsement, with intent to pass the title, invests the holder with the real beneficial interest. (2 Schouler 75, et seq. and notes, Grover vs. Grover 24, Pick 261, 1 Schouler 156 et seq., and notes.) But notwithstanding these rulings, which resulted in the over-ruling of Sir John Leach's judgment by Lord Eldon, upon the point of legal and equitable title, yet the quotation from his judgment above remains the law. The change is this: It was formerly held that in either class of gifts the *legal title* must pass to constitute an executed gift, while now it is settled that the *equitable* title, and not the *legal*, determines the question of transfer. But in order that an instrument shall pass by delivery as a gift without indorsement, it must be delivered to the donee, or to some one for him, with "*a suitable intention of transfer.*" (2 Schouler 158, and note 3.) This, of course, means an intention of immediately transferring the equitable and the beneficial title to the money represented by the security to the donee, in the case of a gift *causa mortis*, subject to the implied condition annexed to such a gift. Learned counsel cite authority to the same point, but as our argument before the Circuit Court, which was printed, is substantially re-printed here, and had been revised before we received ap-

pellant's brief, we let it stand and proceed a step further in the distinction involved in the assignment.

The proposition under discussion is well stated by the American editor in the note to Ward vs. Turner, thus: Delivery is essential to a gift, whether it be *inter vivos* or *mortis causa*, there must be an actual handing over, with the intent to transfer the right of *property* and *possession*. Citing 22 La. R. 144; 55 Me., 184; 54 Id., 445; 2 Green 419; Id. 407; 28 Ind. 449; 27 Tex. 355, 30; Ga. 257; 30 Id. 71; (1 Leading Cases in Equity 1233, 4, Am. Ed.) Again: "* * * * A gift, *mortis causa*, is as much within this rule as if it were absolute. There must be a present delivery, passing the right of property and possession. Jones vs. Smallpiece, 2, W. & S. 551." (Id. 1244.) Again: "Though subject to defeasance by the donors, restoration from danger, and in other ways, the property must pass at the time; and not to be intended to pass at the giver's death. Duncan's administrator vs. Duncan, 5 Littell 12, 13; Wolden's, administrator, vs. Dixon, 5 Monroe, 170, 171." (Id. 1243.)

These authorities simply establish the principle that a *donatio causa mortis* is *an executed gift inter vivos*, upon an implied condition subsequent. And this proposition is well sustained in the States generally, and particularly in the State of Tennessee, where the gift is alleged to have taken place. In Nicholas vs. Adams, 2 Wharton 17, Chief Justice Gibson says;

"*Donatio causa mortis* is something spoken of as being distinct from a gift *inter vivos*, the former

having sometimes been supposed to be made in reference to the donor's death, and not to vest before it, but inaccurately as it seems to me, as this gift, like every other, is not executory, but executed in the first instance by delivery of the thing, though defeasable by reclamation, the contingency of survivorship, or deliverance from peril, the gift is, consequently, *inter vivos.*" Again he says: "All agree that it has no property in common with a legacy except that it is revocable in the donor's lifetime, and subject to his debts in the event of a deficiency. The first is not because the gift is testamentary but because such is the condition annexed to it; and the second not because it is in the nature of a legacy, but because it would otherwise be fraudulent as to creditors * * *" And so a gift *causa mortis* was held not be revoked by a subsequently executed will.

The opinion in this case has been criticised, but not upon this point. In Gass vs. Simpson, 4 Caldwell's Tennessee Reports, 293-4, Nicholas vs. Adams is cited as authority, and the doctrine therein, upon this point, adopted. The court, after having noticed the controversy upon this point at some length, and its settlement in favor of the view for which we contend, and after stating that such a gift is subject to revocation, and subject to the donor's debts, for reasons stated, proceed * * * "and all now agree that it has no other property in common with a legacy. The property must pass at the time; and not be intended to pass at the giver's death. * * * It differs from a legacy in this: that it does

not require probate; does not pass to the executor or administrator * * * and at the death of the donor the title becomes complete and absolute, by relation from the date of the gift, and that without any consent, or other act, on the part of the executor or administrator; consequently the gift is *inter vivos*." Whether we regard the law of succession, or of title to movables, the domicil of the decedent, and the place of the transfer, determines that law in this case. This is the uniform statement of the rule everywhere.

In Chase vs Redding, C. J. Shaw discussing the character of such gifts says, (13 Gray 422.) "These gifts, if confirmed and held good do not impair the rights of the widow. Her rights is to the property of which the husband died seized or possessed. The gifts have their full effect in the lifetime of the donor, and the property is not in his possession at the time of the decease, and does not come under the administration of the executors. Parish vs. Stone, 14 Pick, 203."

Learned counsel cite the last three authorities upon another point, and cannot therefore question their force here.

Once more. We cite Mitchell vs. Smith. Before V. C. Stewart 10. L. Tinus, N. S. 520, where the facts are stated and same volume where the case was heard on appeal the testator shortly before his death gave certain notes to his nephew, and said, "I give these notes to you." On the same day he endorsed thereon "I bequeath pay the within contents to S. or his order at my death." It was claimed

as a *donatio causa mortis*. But the Lords. J. on appeal reversing V. C. Stewart held the indorsement testamentary, and failing because not executed according to stat. of wills. 10 Id. 800—

From these examinations we learn that a *donatio causa mortis* must pass such a title to the donee, in the lifetime of the donor, as will prevent any title from passing to the executor or administrator of the donor. In other words, that which is in legal effect a legacy cannot take effect as a gift *mortis causa*.

ASSIGNMENT NOT GOOD AS A DECLARATION OF TRUST.

If it be said that although the instrument can not take effect as a gift, yet equity will give effect to the intention of the parties and carry out that which may be but imperfectly executed, as a declaration of trust or voluntary settlement, and some sanction is given to the idea of uncertain trust, in the answer of Basket, and it is insisted upon by learned counsel for appellant, our answer is: That the endorsement is equally ineffectual, as a declaration of trust, for several reasons. First—As will appear hereafter more fully, the effect of the assignment and delivery of the instrument by the alleged donor was not in form or substance a declaration of trust completed in his lifetime. Secondly — The defendant is a volunteer, and the instrument is not supported either by a valuable or meritorious consideration, and therefore, a court of equity will not enforce it. For if the alleged donor had intended to declare a trust he must have parted with all beneficial title in his lifetime, and have divested himself of the same so far as he was capable of doing so.

The general doctrine is well laid down by the English editor in the note to Ellison vs. Ellison, White and Tudor's, Leading Cases in Equity, 254–5, (last ed.) "Where a trust is actually created, and the relation of trustee and *cestui que trust* established, a court of equity will, in favor of a volunteer, enforce the execution of the trust against the person creating the trust, and all subsequent volunteers, although it will not create a trust nor establish the relationship of trustee and *cestui que trust* by enforcing the performance of an agreement, nor by giving effect to an imperfect conveyance in favor of volunteers;" and to the same effect is Perry on Trusts, section 102, where he states the proposition negatively, thus: "* * * And if a settler intend to make a voluntary settlement in a particular mode, as by conveying the legal title, and he fails to convey the title, the court will not lend its aid to give effect to the settlement in another and different mode, as by converting the attempted conveyance into a declaration of trust, for that would be to convert every imperfect voluntary instrument into a perfect trust."

But the conclusive reason why this assignment cannot be upheld as a declaration of trust, is the same which prevents its being good as a gift; it is testamentary in form and effect. As to whether this assumption is well founded, we will inquire more fully hereafter. For the present we take it for granted. Perry on Trusts, section 90, et seq., and especially section 92, which is a quotation from that most clear and elegant treatise upon this

most abstruse subject. (Lewin on Trusts.) The concluding sentence upon this question is directly in point; it is as follows:

"We may, therefore, safely assume, as an established rule, that if the intended disposition be of a testamentary character, and not to take effect in the testator's lifetime, but ambulatory until his death, such disposition is inoperative, unless it be declared in writing in strict conformity with the statutory enactments regulating devises and bequests."

To the like effect is the closing sentence of Mr. Perry himself in section 97: "So if the preference executed by the settler is in the nature of a testamentary disposition, which requires to be proved in a court of probate, but is so imperfectly executed that it cannot be proved as a last will and testament no trust will be created." If we have shown, as we think we have, that the transfer of the paper can neither operate as a gift, nor a voluntary settlement, if the indorsement is testamentary, it only remains under this head to inquire, for the purpose of determining the effect of the indorsement, what is a testament or disposition by will?

A WILL,

Is simply a disposition of one's estate, to take effect after the death of the testator. 4 Kent's Com. 489; 1 Williams on Executors, 6 note (3). And so little formality is necessary in the structure of a will of personal property, that an endorsement upon a note: "*I give this note to C. D.*;" or "If I am not living at the time this note is paid, I order the contents to be paid to A. H.," have been held testamentary

and admitted to probate. Chaworth vs. Beech, 4 Vesey 565; Hunt vs. Hunt, 4 New Hampshire Rep. 434; and where it is shown to be testamentary, and entitled to probate as a will, an action will not lie upon such a note in favor of the endorsee against the maker; but notwithstanding the indorsement and delivery of the note to the legatee, it is still but a legacy, and the title passes to the executors. Chaworth vs. Beech, *supra*. And this is true of all testamentary dispositions of personalty; the title passes to the executor or administrator, even though it be a specific legacy. 2 Williams on Executors, 797.

Nor is this the less so because the instrument is delivered to the assignee; he remains the bailee of the alleged donor, and no title to the money passes by the delivery, as will more fully appear further along.

Having thus endeavored to define a gift, and a specific legacy or testamentary disposition of personalty, and to mark the distinguishing features between them, we may state the results formally thus: 1. A *donatio mortis causa*, when applied to the facts under consideration here, must consist in a delivery of the certificate with the intention to vest in the donee, at once, the whole title, legal or equitable, to the money evidenced thereby, subject only to the conditions subsequent imposed by law upon all such gifts. 2. This intention to pass the title must be manifested, if by a delivery without indorsement, under such circumstances as to manifest an intention to pass the equitable title. 3. If such

a transfer be by indorsement and delivery, the indorsement must be consistent with the intentions to pass the title as a gift *inter vivos*. 4. If a gift be made by its terms only to take effect upon, or after the death of the donor, it is a legacy or testamentary disposition. 5. A *donatio mortis causa* is taken and held by the donee against the representatives, while a testamentary gift passes to them and can only be taken through them. 6. A testamentary indorsement, though but an indorsement, passes no present title, and that, though accompanied by delivery, and while if executed with proper solemnities, it may be probated as a will, yet, unless so probated, it cannot be operative as a transfer of the instrument, or vest in the indorsee a right of action even after the death of the donor. 7. The indorsement and delivery of the certificate are equally inefficient to pass the title, considered as a declaration of trust or voluntary settlement.

Having proceeded thus far, let us examine the form of the indorsement. Does it import a present gift of the certificate with a present title to the money evidenced by it? or is it but a testamentary transfer of the certificate, to take effect at the death, and a testamentary disposition of the money generally, or in case of the death of the endorser in that sickness, or is it an independent order to the bank to pay the money to the endorsee, upon condition of the endorser's death in that sickness? The indorsement is *inartistic*, it is true, but its purport is clear. Set out in full, it would read: "Pay the money evidenced by the within instrument, to Martin Basket

only, at my death, if I die in my present spell of sickness; if not, do not pay it at all." The legal effect of the language, so far as passing the title to the money, might well be rendered thus: "I give the money, evidenced by this instrument, at my death to Martin Basket, if I shall not recover from my present spell of sickness; if I do, no title ever passes to him."

Says Ch. J. Shaw, speaking of the modern doctrine of gifts *mortis causa* by delivery of negotiable instruments without indorsement: "These cases all go on the assumption that a bond, note, or other security is a valid subsisting obligation for the payment of a sum of money, and the gift is, in effect, a gift of the money, by a gift and delivery of the instrument that shows its existence, and affords the means of reducing it to possession. (Parrish vs. Stone, 14 Pick 198.) This being the true equitable theory upon which this class of gifts are sustained, it follows, as a logical sequence, that where the intention of the donor is expressed, as in the case at bar, in the indorsement, and that indorsement rebuts the inference of a present gift of the money by postponing the payment till the death of the donor, or his death by a particular sickness, the transfer cannot operate as a present gift of the money, and cannot operate to transfer the title to the money at all, except it be executed and probated as a will. It is but a testamentary disposition, to take effect upon the death of the donor in that sickness. The language is a good conditional will, and is, therefore, not a good

donatio causa mortis of the money evidenced by the certificate. (1 Redfield on Wills, 176, 177-8, 9 and notes.) And this view is not changed by the delivery of the note. (4 Vermont, *supra.*)

But it is assumed by counsel for appellant, that the condition of the gift, expressed in the indorsement, is but the condition annexed by law to all gifts of this sort, and that if no condition were expressed it would be necessarily implied by law. That condition is not a condition precedent to the gift, but subsequent; or, perhaps more accurately speaking, it is not a condition upon which the title of the donee shall vest, but upon which the gift shall become absolute, that is irrevocable. But, as we have seen, the title must pass to the donee *inter vivos*, or it never will pass, but will go to the representative, and the gift will fail.

The condition annexed by law, therefore, is not as to the taking effect of the gift as a gift, by the transfer of the property to the donee, but as to its becoming irrevocable. While the condition in the indorsement actually forbids the taking effect of the indorsement as a transfer of the money in the lifetime of the donor.

There is a peculiarity in this indorsement indicated by the last sentence, which throws great doubt upon the intention of the decedent to give the money at all by the indorsement and delivery. He says: "I may live through this spell, then I will attend to it myself." Attend to what? The collection of the money. A little reference to the history and peculiarities of the man may throw light upon the

subject. A few uncontroverted statements of facts may suffice. The deceased was fond of his money. He was distrustful and suspicious. He had made a settlement with his wife which his lawyer had told him was invalid. He hated his family. He had put away his second pretended wife. His first wife had sued him, and he was evading the service of process by traveling through the State in the night. He was in constant fear that his property or money would, in some way, be subjected to seizure by his wife or children. He had deposited his money in a distant State, not with a purpose to dispose of his estate by division among his collateral relations, but actuated by an insane fear, and a characteristic distrust. He seems, with all his love of money and greed of gain, to be anxious to provide against the possible contingency of any of it ever reaching his wives or children, and so we find him recording a pretended sale of his farming utensils, and stock, etc., to Bryan, a pencil gift of the household goods to his (Bryan's) wife, and a pencil will of his farm to his niece, and the alleged gift in controversy; so that with a farm costing $9,000, money amounting to $23,500, and a thousand dollars of personal property, there came into the hands of the administrator, unclaimed by others, less than two hundred dollars. (Testimony of appellee, Hassell p. 553.) This seemed uppermost in his thought, to prevent his wives and children from obtaining any part of his estate. And his act seemed more like a bailment for secretion than a gift. What was the understanding between him and Basket no one knows. It cannot be pretended, however, that he

contemplated a present gift, and doing without money himself, even till his death.

The case of Miller vs. Jeffries, 4 Gratt, is much in point in fixing the distinction between a gift *causa mortis* and a gift testamentary, and we call special attention to the opinion at p. 479.

It is of the very essence of a bequest that it take effect only upon the death of the testator, and it is equally well settled that any disposition of property limited to take effect upon the death of the donor, is testamentary. But it cannot be claimed that the transfer of the certificate was effectual unless the *title passed* at the delivery, and as we have sufficiently shown that the title did not and could not pass, then we need not further press the argument. To the authority on this point we add: 3 Redfield on Wills, p. p. 346, 347, 348, 349 and notes. See also Merchant vs. Merchant, 2 Bradf. sur. 442, deciding last will does not revoke a *donatio causa mortis*. Craig vs. Ketridge, 46 N. H. 57–1. Williams on Ex'rs 658.

If it be said that such a construction as we claim will defeat the intention of the donor, and divert the money from the purposes to which he intended to devote it, the answer is, that this is always the case where an attempt to make a gift or bequest is ineffectual for want of compliance with the rules of law, and the claim here so far from being so meritorious as to justify a disregard of the rules of law, is utterly without merit. Besides, the alleged gift here belongs to a class which should be discouraged rather than promoted. At all

events, there can be no case so meritorious as to justify a disregard of the restraints thrown around persons in their last hours by the statutes of wills to prevent fraud and imposition. Indeed no case was ever presented in court possessing less merit, whether the perversion or total destruction and loss of natural affection was the result of mere depravity, or both depravity and insanity, must be deemed wholly unimportant in the moral aspect of an act so contrary to natural justice as was this gift.

II.

THE SECOND INQUIRY.

Conceding however, for the sake of the argument, that the indorsement and delivery of the certificate was sufficient to vest an interest in the donee or bailee as a *donatio causa mortis*, was the delivery of the certificate made in the apprehension of death? What are the facts: Dr. Bryan and wife, who are relied on, and who are interested, testify in the strongest possible manner to his feebleness, yet they both admit that he was up and about most of the time till the very evening previous to his death. The alleged delivery of the certificate was on the 24th day of November, 1875, and H. M. Chaney died January 23, 1876, two months after.

E. A. Bell testifies that he was one of Chaney's nearest neighbors, and very intimate with him from October, 1871, to January, 1876, at his death. (Rec., p. 161.) He describes him as a lean man, six feet or over high, spare built, a little stoopshouldered, 60 to 65 years old; he never looked very

stout, always complained (Rec., p. 162.) He saw him during the whole time upon an average once or twice a week, and their relations were very intimate. (Rec., p. Id.) He complained a good deal of his stomach, and took a good deal of medicine; witness got it for him frequently. * * Was at Chaney's between the middle of November and his death, as often as once a week, and generally found him up and about the place; saw him out of the house about the place in his lots very frequently after Basket was there (the time of the alleged gift. Rec., p. 163.) In December, just before Christmas, C. came out to the fence, some forty or fifty yards from the house, and gave witness money to pay taxes, and then came out again in the evening and took receipts; said he had intended to go himself but it was too cool; did not look materially different from other times he saw him. (Rec. p. 164.) Witness also relates the case of a visit to the house of Chaney when he was receiving pork, when he was about the house and gave directions; Chaney complained of his stomach being disordered, and said that if he could get that cured, so he could eat, he would get well; he had a dry, hacking cough, and said it annoyed him. Never heard C. say anything about having consumption, nor that he apprehended death. (Rec. p. 168.) He talked, after November 24th, to witness about wanting certain portions of the farm cultivated, and certain portions to lie out, in order to have some ready for another year. (Rec. 168.) Witness relates the substance of what occurred the evening before the death of deceased, showing he did not apprehend death even then; although more

feeble than usual he was up and about the house and conversed about business; made an arrangement for the renting of his farm, and talked as though he had no apprehension of death. (Rec. 169.) He complained to the Doctor in Nashville, whom he visited with witness, a few months before his death, of disease of the stomach, nothing else. The evening before his death he invited witness to come next day, he wanted a long talk with him, and no apprehension of his death was entertained that evening. (Id.)

Mr. Bell also testifies that while Martin Basket was visiting, on the visit at which the gift is alleged to have been made, he (Basket) came to his house, half a mile away, and said that intestate came with him to a fence near the house but returned on account of the cold. (Rec. p. 180.) That up to a period after Basket was there he had seen C. from time to time at various times, on one occasion on the road near the house, on one occasion near where the men were working the road, and he said he wanted to do his share, and as he could not work he would furnish timber, and up to this time witness saw no visible change in his appearance since he has known him. (Rec, p. 165.) This witness is contradicted, but not upon these points, and he is, at the same time, corroborated by several others.

Dr. BLANKENSHIP, a country physician, says he saw deceased very frequently, almost every day of his life for the last two months of his life; sowed a crop of wheat there just before his death; was intimate with him; he was always complaining; com-

plained of his stomach; had dyspeptic symptoms; but witness never saw him but he was able to go wherever he liked; never saw any change in him till the last time he saw him, within a week of his death, when he saw him on business; he talked on business, as usual, he said he had been having chills, and was feeble in consequence, but he seemed convalescent; he never complained of consumption or anything of the sort; he was, for a few weeks previous to his death, confined mostly to his house, but not so as to prevent his walking in the yard; he complained of a hacking cough, which he attributed to cold, but had no symptoms of consumption. Blankenship's testimony in chief. (Rec. p. 201—211.)

N. H. STRATTON also testifies: He lived three-fourths of a mile from C., and knew him from the time he came to T.; his way to town was through C.'s barn lot, near his house; passed there frequently during last two months of his lifetime; saw him once or twice about his barn in the last two months; his condition seemed much as it had been before; he was a little stooped all the time he knew him, but not more so than usual; when he saw him last, in December 1875, he went to his house to buy a young steer; he was in the lot near the road, near the house, and he said he had plenty of grass, plenty of feed, and he preferred to keep him till he was better matured; he did not remember that he complained. (Stratton's testimony in chief, Rec. 230–2.)

THOS. WOOD, on cross-examination, testified that he saw Chaney out in the woods lots while Basket was there, and out about the premises fre-

quently afterwards. He describes premises also. (Wood's cross ex., Rec. p 971.)

IRA A. DORRIS testified that he saw decedent out in the road, outside of the premises, within a week of his death. (Cross ex., Rec. p. 978.)

In addition to this testimony, it appears by the testimony of Dr. Franklin, that when he treated the deceased, he had chronic *gastritis*; Blankenship says he died of this disease; Bryan told everybody he died of *congestive chill*. Now while it appears from the testimony of the physicians who examined the vital organs, at the autopsy, that he probably died of consumption, it is very clear that the deceased never dreamed that he had any such disease. The pretense of Dr. Bryan, of describing consumptive symptoms, is, like all his pretenses, utterly contradicted by everything he said and did at the time of the death. Bryan never *dreamed* of consumption till after the *post mortem* examination, as manifest from the whole of his testimony.

Dr. Bryan is unworthy of belief. He contradicts himself. Cross ex. Q. and A. 133—136, p. 963.) And is contradicted by Bell, Dorris, Blankenship, and everyone who talked with him about Chaney's disease. (2 p. 24.)

That Bryan in wholly ignorant of medicine and utterly unscrupulous in his testimony, we refer to the whole testimony, or any part, but especially the cross-examination, for the proof. Mrs. Bryan makes Chaney talk about consumption, but she is interested, is much under the influence of her husband, and quite reluctant to state any fact which militates

against the defendant. The cause of Chaney's death is very obscure. Whether it was caused by congestive chill, by gastritis, by some of the many poisonous drugs given by Bryan or by consumption, is a very doubtful question. But if he died of consumption, he manifestly believed to the last that it was his old stomach trouble. Concerning this, he writes in his letter in 1874, in a spirit as despondent as that manifest here, more than a year before his death. (No. 1 Exhibit to Rob't Chaney's deposition, Rec. p. 157—8.) The question then recurs, were this indorsement and delivery made in apprehension of death "*then inminent?*" In the light of the evidence, we answer "No." True, he says, "my life seems uncertain;" and so is every life. "*I may get over this spell.*" What spell? A paroxysm of dyspepsia, perhaps, or possibly his general sickness. But, however, this may be, it is manifest that under the most liberal of the rulings upon this subject, the construction of *apprehension* of death is not sufficiently liberal to comprehend a case like this. Here the deceased was up and about, able to attend to his business at the time, and continued to be so up to the day before his decease. Suppose he had made the gift on the day of the date of the letter to his daughter? It clearly could not have been held to have been given in apprehension of death, yet his expression of apprehension of death was quite as strong there as here, and in the view of the physicians he had the consumption then, and in that sense died of the same sickness.

Hear him in his letter to his daughter, above

referred to, two years before his death: "My picture you can have when you come, * * * I am now too thin in flesh to have it taken, and not able to ride to town. * * You speak of coming to see me. My life is not insured. I cannot stay long without a change. I may be here when you come, or may not be. * * *"

We are aware that there never was any question which has been the subject of so much absurd refinement as this one of the *necessary apprehension of death*, in this class of gifts, and it would be absurd to enter into a lengthy discussion of it. The great diversity of rulings arises out of the equity judges having constantly sought light from the *civil law*, which, upon this point, has no analogy to ours. The definition of this class of gifts is a *death bed gift*, and the attempt to extend it so as to become a substitute for a deliberate testamentary disposition of property by every one who is feeble or infirm, either with sickness or age, is to introduce into our law uncertainty and confusion beyond reconciliation. No one can examine this subject, in the light of the immense number of cases with which our reports abound, without being forcibly struck with the prevalent uncertainty upon this point, and the tendency of the courts, of late, is therefore, rather to restrain than to extend cases by loose construction. Let us examine: In Smith, administrator, vs. Dorsey, 38 Ind. 451, many cases are reviewed and examined, and among the cases cited there with approbation, is Irish vs. Nutting, 47 Barb. 370, which is a leading and well considered case

upon the subject of the condition of the donor necessary to the validity of such a gift, and from this latter case the court cites this language: "There will no case be found where such a gift is upheld, in which there was not either peril of death from some cause *imminent* and pending, or the conceived near approach of death; and this is a sensible statement of the principle.

And again, quoting from Shirley vs. Whitehead, the court adopt the language of Gaston, J.; "Indeed it is not easy to conceive how a *donatio mortis causa* could be established by any proof in a case like this, where the testator was not surprised by sickness, but lived for months afterward, and had abundant opportunity to make his testamentary disposition in the regular and ordinary way. The reasoning in these cases is unanswerable, and the only safe rule. Yet we do not pretend to say that such gifts have not been sustained in many cases upon a much lower degree of apprehension of death than is contemplated in these authorities, but there is a manifest tendency, as we said, to limit these gifts to the exact rule, or the cases coming within the reason of the rule, and no case can be regarded as within the spirit of the rule where the donor is able to go about and attend to business. A good illustration is found in Sheegog vs. Perkins, in the Supreme Court of Tennessee, (4 Baxter 273). The case is thus stated by the court:

"The proof shows that Constantine Perkins returned in the spring or summer of 1864 from Arkansas, to his home near Columbia, bringing with him

a large amount of U. S. currency. The country at the time was in great disorder, the civil war then flagrant, and in the section where he lived both life and property were very insecure. He came to Nashville and converted a large amount of his currency into gold, and deposited a tin lock box of gold coin in the Planter's Bank, with instructions to the Cashier to keep the same on special deposit, and deliver it to no one but himself, and in the event of his death, to no one but his wife. His state of health at the time was precarious and feeble. He had been admonished by his physician, some time before, that he could not live long. He was, however, in a condition to attend to outdoor business, and was, at the time, contemplating another journey to Arkansas during the Winter next thereafter. Having made the deposit as aforesaid, he returned to his home and delivered the key of the tin box to his wife, the complainant. * * "

The gift was held invalid, though the donor died shortly after, of the same sickness, because there was not sufficient apprehension of death shown at the time of the gift, notwithstanding the donor had been admonished to expect death, just as it came upon him, suddenly; yet as he was able to attend to his business the court held there was not a sufficient apprehension of death. The court close the opinion upon this point thus: "It is said that too much care cannot be taken in insisting upon the most convincing evidence in cases of this kind, for these donations do amount to a revocation *protanto* of written wills, and not being subject to the forms

prescribed for noncupative wills, they are certainly of a dangerous nature, (3 Binney 366). In Miller, administrator, vs. Jeffries, (4 Gratton 472) it is well said that this kind of a gift is of a mixed character; partly testamentary, partly donative, from an indulgence to the nature of the emergency, the law dispenses with the solemnities of a testament, and for that *very reason requires the essentials of a gift.*" See also Weston vs. Hight 17, Maine 287.

In Schouler, on Personal Property, at the close of his chapters upon this subject, after urging the necessity of legislation to prevent the abuses and uncertainties arising out of the present state of the law, the author proceeds: 'Until public policy works up to this point the court may well apply the maxim put forward in one of our late American decisions: "It is far better that occasionally a gift of this kind fail, than that the rules of law be so relaxed as to encourage fraud and perjury.

The case at bar is one wherein this precaution is every way appropriate. Here the decedent is surrounded with collateral relatives. He dies suddenly, a victim of disease, poisonous medicines, or quack nostrums: And after his death everything earthly which is in the reach of these nephews and nieces, amounting in value to over thirty thousand dollars, is under their claim, and this acquisition is not only *inofficious*, out of the line of legal succession, but in every instance the title set up is peculiar and eccentric.

Most clearly the requisite apprehension of death is wanting. It is not alleged in the answer and cross

bill except by inference, (Record pp. 26—28, 34,) and is not only not sustained, but is actually contradicted by the proofs.

ANSWER TO THE ARGUMENTS AND AUTHORITIES OF COUNSEL UPON APPELLANT'S I. AND II. POINTS.

1. Then as to the testamentary character of the endorsement.

Learned counsel quote from the opinion of the Judge of the Circuit Court thus:

"But it is said that the subject of a gift *causa mortis* vests in the donee only at the death of the donor, and that therefore, the condition expressed in the assignment would have been implied had the certificate been delivered with a blank endorsement, or no endorsement at all. It must be conceded that *some of the authorities seem to support this view.*"

And then with an *ex cathedra* air proceeds:

"On the contrary, we maintain that the current of modern authorities, English and American, *absolutely determines* the proposition presented to the judge (in favor of Basket). * * *" We will not imitate learned counsel by contradicting his dogmatic utterance, but we simply refer to our arguments and authorities without repetition, to the effect (1) that a *donatio causa mortis* must be a perfect *gift inter vivos*, subject only to a condition subsequent. (2) It must leave no title to pass to the administrator. (3) It must not be so that it would be revoked by a testament, as it will if it be testamentary. (4) That the gift is a testamentary gift. (5) That the endorsement might be probated if properly

authenticated. (6) That the gift would be revoked by a will, and (7) that being testamentary, the gift cannot be sustained as a trust. We have sustained all these propositions by such names as chief justices Gibson, Shaw and Woodard in cases cited by learned counsel for the appellant, and by numerous authorities, English and American, none of which are contradicted or contravened by appellant's authorities upon this point. Indeed the law is plain upon most subjects, but the difficulty arises in its application to the facts of each case. Two or three of appellant's cases may suffice for illustration of all of them; Richardson vs. Adams, 10 Yerger, 273, was a *good trust*, the title and possession passed presently to the trustee; the question of *donatio causa mortis* was not decided, the condition was the *donor's non-return* and not his death. Gas vs. Simpson, 4 Caldwell, might be maintained perhaps upon the same ground. We shall note it again upon the next point.

So in Grymes vs. Hone 49, N.Y. 17, the stocks were transferred in equity *in presenti* to the daughter; and the title and possession at once passed, the delivery made to the mother for the donee is a good gift so far as passing the title is concerned.

There is no limitation of the assignment of the stock to take effect after the donor's death, and the non-observance of this distinction is the point upon which learned counsel go astray.

And so of all the cases, where bank book assignments and deliveries have been sustained. They have all been sustained upon the general theory

about which we make no controversy, that the equitable title passes at once from the donor and vests in the donee by delivery to him, or some one for him. But none of them contain any limitation upon the transfer which gives it the character of a testamentary gift. The contention here is, that the distinction is between a gift *causa mortis* proper and a testamentary gift, which we think we have made quite clear elsewhere by reason and authority, and as no authority cited by appellant goes to that point, our position remains unshaken.

2. "*The expectation of death then imminent.* What is it? We have perhaps already sufficiently discussed it, but before proceeding to examine the authorities we call attention a little more carefully to the meaning of the terms uniformly used. "Imminent" means "threatening immediately to fall or occur," and there must be such an apprehension of death here. But learned counsel taking the civil law view and seeking to have the law accomodated to the facts claims that the case made by the evidence is within the authorities. In our contention against the claim we call attention to the fact that this alleged gift is inofficious, and therefore the alleged donee has a *double* burden upon him to show by a clear preponderance of the evidence all the points necessary to the maintainance of the gift.

Counsel for appellant rely upon Grymes vs. Hone *supra*; Richardson vs. Adams, 10 Yerger 273. Harris vs. Clarke, 2 Barb. sup. Court 94. (affirmed in Comstock 93.) and Gass vs. Simpson, 4 Caldwell 288.

Richardson vs. Adams was not held a *donatio causa mortis* but a gift *inter vivos* in trust. Harris vs. Clark was the gift of the donor's own check in apprehension of death, which failed as a *donatio causa mortis* in both courts.

Gass vs. Simpson, like Nicholas vs. Adams, upon which it is based, though correct upon the nature of the transfer of the property, lays down the rule as to the character of apprehension of death necessary to sustain this class of gifts, too broadly. Indeed the case was wrongly decided, but Nicholas vs. Adams was correctly decided, though the great chief justice mis-stated the common law in reference to the question of the necessary apprehension of death, and many inferior judges have been misled because the chief justice took his definition from the civil law. This part of his opinion is criticised by Ch. J. Woodard in Michiner vs. Dale, 23 Penn. St. R. 59.

Gass vs. Simpson was a gift by a soldier just entering the army, with no other apprehension than such as is necessarily consequent upon enlistment. Against this is Shegogg vs. Perkins *supra*, since decided by the same court, which virtually overrules it, and adopts the language of Mr. Justice Baldwin, in Miller vs. Jeffries, where he enjoins great care upon the courts, and says, that * * * "from an indulgence to the nature of the *emergency* the law dispenses with the solemnities of a testament and for that *very reason requires the essentials of a gift*," and the court there hold the gift invalid though the apprehension of death was far greater there than here. But against Gass vs. Simpson we have

Gourley vs. Linsenbiegler 51 Penn St. 345. Dexheimer vs. Gautier, 5 Rob. (N. Y.) 216. Irish vs. Nutting 47, Barb. 370, (exhaustive). Smith vs. Dorsey, 38 Ind., 451; Linsenbigler vs. Gourley 56, Penn st. 166. Mr. Schouler in his note citing these authorities says, "But see Gass vs. Simpson, 4 Cald. 288, which seems to have been decided wrongly upon the facts." 2. Schouler on Per. Prop. 147, note I. For a full discussion of the whole subject see 2 Schouler, 143 et seq.

Grimes vs. Hone much relied on by learned counsel is a case where the rule is relaxed far beyond the ordinary rule, and we insist, was not upon this point well decided; it extends to one of the civil law ingredients, *old age*. Besides it is a case where the court below had found the facts, and presumptions, after an appeal to the general term of the Supreme Court, are all in favor of the rulings, of the lower court upon questions of fact. And so the court simply allege, they cannot say there was not a sufficient apprehension of death to sustain the gift. Indeed, in personating the donor, the court make him say, "*I am ill and fe r I shall die, etc.*" But it is submitted that the case made by the record is weak here, for the illness does not seem to have begotten such apprehension of death as to create an emergency dispensing with testamentary forms.

We think we have sufficiently answered the argument of counsel upon these two points. They content themselves with the *dictum* of the court that the decedent was not insane. Only throwing at us

by innuendo in their statement of the records an intimation more or less covert, that we were slow in finding out insanity. If counsel will deal fairly with the record they are welcome to all they can make of it. Such an argument is about as forcible as the one based upon the insinuation that we should have moved to dismiss the appeal earlier, so they could have brought another, or the sneer at the moral reasons found in the opinion of the *district* judge.

We prefer however to support the ruling of the court below upon three grounds rather than one and shall therefore proceed to our third point.

III.

THE THIRD QUESTION—WAS THE DECEASED, AT THE TIME OF THE ALLEGED GIFT, A PERSON OF UNSOUND MIND?

We put the inquiry thus, because we concede that sanity is presumed, and that where insanity, either total or partial, in any of its forms is alleged by us, the burden of proving it is upon us.

Unsoundness of mind is used here because, as generally used, it signifies insanity or *mania* of every grade. (2 Bouv. L. Dict. 514, Id. 90—91, 1 Redf. on Wills 61, section 58 Subd. 5.

The position we shall attempt to maintain is: that Hillery M. Chaney, during the last seven or eight years of his lifetime, while upon general subjects sane and intelligent, was a *monomaniac* in a double sense, as we shall see more fully as we proceed. That he was suffering under a mental *delusion* as to the chastity of his wife and the paternity

of his children, and also under a total perversion of his domestic affections, his affection and regard for his wife and children being totally destroyed, and that hence he was affected with partial *mental* and *moral mania*. And to save complication in the discussion of the subject we may designate this condition of unsoundness of mind, which we shall insist is proved to have been present in the life, character and habits of the deceased, as *monomania*, embracing *intellectual delusion* upon the subject indicated, as well as a perversion of the moral feelings, affections and sentiments of the deceased upon the same subject. These two classes of *partial mania* are properly embraced under this term. (1 Redf. on wills 69, section 10, sub. 4—5, Wharton and Stille's Med. Jurisprudence, Section 106.

Before entering upon the general discussion of the subject it were well to inquire by what rule of mental capacity the validity of gifts is to be determined. Mr. Schouler lays down the proposition that the capacity necessary to the validity of a gift is rather that necessary for a valid contract than testamentary capacity; but that as gifts *mortis causa* are *sui generis*, the necessary mental capacity requisite is governed by no fixed rule. (2 Schouler on Per. Prop. 129 et. seq.) But as a lower degree of mental capacity suffices for a valid will than a valid contract, it may be that the rule as to the latter prevails here; and that where the case of a gift is presented, as it is here, the necessary capacity and the rules which govern as to delusion or influence are similar to a case where the validity of a will be-

queathing the same certificate was involved. By the civil law, by reference to which our law on this subject is so much confused, the same capacity is required as in case of a testament. But by that law this sort of gift to be valid must be witnessed in the same manner as a testament. (Domat's Civil Law, section 3482, et. seq.)

We shall, therefore, in the further discussion of the mental condition of the deceased, assume that the alleged gift is not governed by the precise rule which would govern the case if defendant, Basket, were claiming the money as a legacy under a will, for the reason that in the one case the testator is surrounded by proper guards, while in the other they are wanting. But at the same time we expect to show that if the alleged gift were by will, it could not stand.

It was long held that any mental unsoundness, however partial, would vitiate a testamentary disposition as well as a gift. But this theory has been long since abandoned, and the doctrine now prevails that where the testator is a *monomaniac*, unless the gift be the offspring of the morbid delusion, it may stand, although the Supreme Court of this State, in Eggers et al. vs. Eggers et al. 57 Ind., 461, have held that any unsoundness of mind will disqualify one from making a will, and this is the law in Indiana. But where the disposition is the unqualified offspring of the morbid delusion, it is everywhere held invalid. It was so held first by Sir John Nicholl, in Dew vs. Clarke. (Add. 279, which was affirmed by Lord

Lyndhurst 5 Rep. Ch. cases 163 cited, Redf. on Wills 73.)

It is well said, in a recent American case, that the legal principle, however much it may have been obscured by pathological darkness and confusion, is that a product of mental disease is not a contract, a will, or a crime. (Maudsley 105, quotation.)

Monomania consists in a mental or moral perversion, or both, in regard to some subject or class of subjects. (1 Redf, on Wills 71.)

As we have said, the subject of this discussion was a monomaniac in both senses.

Dr. Ray, who has always been regarded as the very highest American medical authority, says "madness is not indicated so much by any particular extravagance of thought or feeling, as by a well marked change of character or departure from the ordinary habits of thinking, feeling and acting, without any adequate external cause." (Ray's Med. Juris. of Insanity, section 128, cited 1 Redf. on Wills 68.) This change may relate simply to a single subject or class of subjects, and may result from partial or total mental delusion, or partial or total perversion of the moral feelings, sentiments or affections, or from both mental delusion and moral perversion. (Maudsley's Responsibility in Mental Disease 115; quotation from Ch. J. Cochburn.)

Let us examine the evidence briefly to see: First, whether this change in the life and character, this departure from the ordinary habits of thinking, feeling and acting is found in the history of complainant's intestate, and if this question is answered

in the affirmative then, secondly, whether there is any adequate external cause for this departure.

EARLY HISTORY OF DECEASED.

The evidence shows that Hillery M. Chaney, who was born somewhere from 1808 to 1810, was brought up and lived in Nicholas county, Kentucky, where he remained till the spring of 1871. That he was married in 1832 to Miss Hardy. (Mrs. Chaney's testimony, Rec. 252.) That up to about the year 1868 he was a shifty, energetic and successful farmer and trader. There is nothing unusual in the history of his life up to the latter date. Brunker says: "Mr. Chaney, before his intimacy with *Man Hyatt*, was a good man; his family were a good family; his wife was a woman of unexceptionable character, and his children were good children. He states that Bob and his father had some disagreement, but this was after the beginning of the intimacy with Hyatt. (Rec., p. 282–287.)

Again Mrs. Chaney says, although he was an eccentric man, yet up to the time of this intimacy she had no serious difficulty with him, and there were no expressions of hatred or dislike to the children and no complaint of unchastity against her, no pretense of such a thing. (Mrs. Chaney, R. p. 260–262, cross-ex.)

There is a significant basis for the statement that his moral and social tastes were pure and modest. In the testimony of one A. J. Banta, Judge of Nicholas county, examined for the defendant, in his cross-examination he was asked whether he knew the mental condition of the deceased upon the sub-

ject of sexual intercourse about 1872 or 1873, after Chaney left Kentucky and returned, he answered: "I never talked to him on the subject, and the time was when he was the last man to whom I would have mentioned such a thing." Thus at once evidencing his former purity and his latter degeneracy. Testimony of A. J. Banta, Q. Rec. p. 756-757.) Up to this period too we find the natural normal evidences of paternal and filial affection between father and children. Mrs. Hardy, the daughter, testifies that he treated his children well enough until Nan Hyatt came there. (Rec., p. 144, 123.)

Thus the evidence shows what would perhaps be presumed, and what is nowhere contradicted, that up to the beginning of this intimacy with Mrs. Hyatt, Hillery M. Chaney was an honest, truthful, contented, industrious and frugal citizen, addicted to no excesses or popular vices. He had lived with his wife for 36 years, had raised six children, five of whom survived, and all of whom had married and settled. So far as the evidence shows, the home was a happy one, although it is true that Mrs. C. says he was hard to get along with, yet this might be said of any eccentric man, perhaps, of his class. Much is attempted to be made of the recital in the post nuptial agreement, that the parties had, for many years, lived unhappily, but that has as much force, perhaps, and no more, than the consideration in the deed made at the same time, which is said to be in consideration of *natural love and affection.* This recital is not true, as there is not a particle of proof of any domestic disturbance till the appearance on the stage of Nan Hyatt.

It is true, among the wild talk of the deceased in late years, he made many foolish pretenses of bad treatment by his wife and son, but he never once fixed the time of any of this imagined bad treatment before the intimacy with Hyatt, and we will show, when we come to notice these pretenses of neglect and bad treatment before the intimacy with Hyatt, and we will show, when we come to notice these pretenses of neglect and bad treatment, that they are but the silly imaginings of a disordered mind, and none of them apply to the daughters. Now the deceased has reached his three score years with the history of ordinary men of his station in life, and, so far as the testimony shows, without any domestic discord, or even the suspicion of moral or social obliquity.

THE DEPARTURE.

But now comes the change. He becomes intimate with Mrs. Hyatt. She takes up her abode on his farm. He visits her, stays with her, lives in adultery with her. This becomes public; his wife expostulates; they quarrel. He goes mysteriously to his neighbor, the storekeeper at the crossroads, and calls him away from a sustomer, and says, confidentially: "*Bob is no kin to me.*" "Why, you are crazy! What do you mean? Bob is as much like you as if you had spit him out of your mouth. Whose is he?" "Old Nat Conway's. And Lizzie and Tabitha are not mine, either." "What," says the neighbor, the storekeeper, "Don't you let me hear you ever mention this again?" Why not? Why this sudden change from more than thirty

years of paternal recognition, to an unnatural, aye, an insane, denial of paternity? There is much shrewd common sense and observation in the testimony of this witness, and the opinion of such a witness, as to mental condition, can never be despised. He exclaimed: "*You are crazy;*" and he was right. Rec. 283, Q. 7.

But let us proceed one step further. About the same time the deceased, in a conversation with a colored servant who was working for him, says to him: "*I like Sallie*" But, says the servant, "don't you love your daughters?" and he said "No; Lizzie and Tabitha are not mine; they are Jones'." Again he repeats the same thing to his wife, and in a manner which "*sounded to folly.*" (Rec. p. 255—6, Mrs. Chaney's testimony, interrog. 17 to 31 with answers.) Shortly after this the scandal arising from this adulterous association with Mrs. Hyatt became so offensive to the wife and family of the deceased that a separation was the result, and we next find the deceased, a few months afterwards, with Mrs. Hyatt, in Hancock county, Indiana, and here he lived for four months, during which time he repeated his story, there was but one of the children his, to Banta and to Squire Davis and his wife; to Davis he attempted to give a reason for his belief. (Rec. p.p. 313–314. Id. p. p. 319—322. Id. 304—305. Id. 307–8–9.)

We call special attention to the manner in which all these revelations of the illegitimacy of the children were made, about which more hereafter.

Having obtained his divorce in Hancock county, and having married his woman, he proceeds to

Tennessee. He becomes acquainted with Capt. A. E. Bell, and he tells him, Bell says, that there was but one of the children his. and that was his daughter Sallie, *Mrs. Perrin.* (Rec., p. p. 183-4.) It is a marked peculiarity in this departure concerning the children, that in Hancock county, and in Tennessee, he always qualified the charge, excepting his daughter Sallie, and never did include her in the charge. And it seems that he had some partiality for her; wrote for her to visit him, (Exhibit A to Rob. C., Rec. 116, et seq.,) and that when he was back in Kentucky he invited her to come and see him, and falsely told her Nan Hyatt was not with him. And another fact is worthy of notice, that after Sallie had come to see him and quarrelled with his woman, and left suddenly, he says to Lowry, in lamenting her behavior: "She is all the child I have." (Rec. p. 345.) And Bell, in his last testimony, says Chaney, told him more than two dozen times that there was but one of the children his, that the rest were all illegitimate. (Rec. p. 183.) And corroborative of this departure, Mrs. Bryan tells that he expressed his utter hatred for his wife and children, telling the most silly and improbable stories of the treatment of *Bob* to him, (Rec. p. 888-890) which silly statements are not corroborated, but utterly denied by Bob. And the climax of all of which was that "he neither wanted to see his wife and children in this world nor in the next." (Rec. p. p. 888-889.) In addition we have the same testimony from Dr. Bryan, who says he said the children were not his. (Rec. p. p. 929-30.) As a consis-

tent link in the chain of history, is the putting away of the second wife. We have here a total departure from the former life of the man, and we insist that it plainly indicates two things: First, a well marked and unmistakable mental delusion; and second, a complete perversion of the human instincts, domestic affections and moral sense.

2. Is there an adequate external cause in the testimony? It is assumed, in this examination, that the evidence only shows *depravity* and not *delusion*, and in the cross-examination of some of the witnesses it is admitted that depravity might cause a man to call his children bastards, and his wife a prostitute, in self-justification or in anger or revenge. And this might possibly be true, though as stated by Dr. Evarts and Dr. Lining both, it would be difficult to imagine that awful state of depravity, short of insanity, that would induce such a change. But conceding that such a case is possible, still the evidence shows no such a case here. In the first place there is no pretense of any cause of malice or revenge toward the daughters, there was no quarrel with any of them but the one whom he claimed as his only child. There is not the slightest pretense of any charge against any one of them of any ill treatment or maltreatment from any one of the daughters but the one he admitted to be legitimate. If he had called his children bastards, simply as opprobious epithets, he would have charged the one whom he charged with attempting to entice him to go to Kentucky to bring her home with him, for the purpose of having him arrested. (Rec. pp. 888—890.)

We again call special attention to the manner in which he introduced the subject to the witness, Brunker. In the first instance he called him away from waiting upon a customer, not to denounce his wife as a bad woman and his children as bastards, from hatred or revenge, but to announce the startling fact that his son, with whom he had had difficulty, was no kin to him, and that two of his daughters were likewise illegitimate, not in a rage, in a spirit of revenge, nor by way of self-justification, but because he was laboring under an insane delusion. The witness rightly characterized his conduct: "*You are crazy, sir,*" and so he acted, and so he was. And so of the communications to *Banta*, to *Davis*, to *Mrs. Davis*, to *Bell*, and to *Lowery*, not one of them in anger or revenge, and that to *Lowery* was certainly in sorrow, that his *only child* should fall out with him. It is assumed all the way, by hypothecation in evidence, that the family were all involved in the quarrel, and that they had all been guilty of unfilial conduct towards him, and that they all joined in an agreement with the father to accept the home farm as all they were to receive from him, and released all other claim. And yet there is not the shadow of foundation in the evidence for any such theory. It is true that Bryan and wife use the word "*they*" in detailing the statements of the family to him, but even this is not proved by any one else. And as to how far we are bound by his wild and unnatural talk, we should not stop to inquire; but under the allegation of mental delusion, we certainly would not be concluded; and if there was any

truth in the charge that the daughters were engaged in any persecution to justify his involving them in the slander, we might discuss the subject. But, as we have said, the only one whom he charged with persecution especially, is the one he claims as his daughter, and who died before he did.

Now we submit that the testimony shows unmistakable evidence of mental delusion, and that it shows no adequate external cause. But in all cases where there is a doubt as to the question whether there is an insane delusion, or mere eccentricity, perverseness, depravity, or other external cause, which might or not be regarded as adequate, the whole history of the man, together with his genealogy, should be taken into account.

HEREDITARY TENDENCY.

Says Dr. Stille on this subject: "The tendency of observation upon this point is that not only does the existence of insanity in the offspring afford a a violent presumption of its existence in the parent, but that its existence in the parent affords the same presumption as to its existence in the offspring." (Wharton & Stille, Med. Jurisprudence, section 85-86, 1 vol. edition.) And: "It is admissible in trials of mental capacity and soundness, the existence of insanity in any of the blood relations of the person whose mental condition is the subject of inquiry, whether such person be lineally or collaterally connected." (1 Redfield on Wills 156, Baxter vs. Abbott, 7 Gray 71, citing Esquirol on Mental Maladies, by Hunt 49, 1 Beck Med. Jur. 10 Ed. 725, Taylor's Med. Jur. 629, Ray's

Med. Jur., sec. 72. Comb on Medical Derangement 96, who says that authors who differ on all other points, agree in this: (Frere vs. Peacock, 3 Cust. Ecel. 664.) Indeed, for reasons apparent, in the tables taken from registers of insane asylums, such a proposition can hardly be questioned (See table in American Encyclopedia, Title Insanity; see also chapter in new edition of Wharton & Stille, Medical Jurisprudence sec. 362 et. seq.; also opinion of Gibson C. J., Smith vs. Kramer, 1 Am. L. Reg. 353.)

This proposition being established, and conceding that there might be doubt as to whether the acts and conduct of the deceased manifested mental delusion upon the subject of the chastity of his wife and the paternity of his children, let us look at the evidence of hereditary taint, and here we have the very strongest corroborative testimony; and first, the son of the deceased was in the insane asylum and died insane. Secondly, the sister of the deceased was an idiot. Thirdly, the father was weak minded, a *half idiot* one of the witnesses styles him, and fourthly, his cousin and his descendants were afflicted with epilepsy, which is a kindred disease, and constitutes the same presumption as insanity. (Wharton and Stille, sec. 146, Maudsley 41.) These propositions are established by the testimony of the witnesses Turley, (Rec. p. 514,) Webb, (Rec. 529-30,) and Horatio Chaney, (Rec. p. 546–747.) Again, it is everywhere admitted that while a person may be apparently sane upon all subjects excepting a single delusion or moral perversion of feeling and

action upon a given subject, or both, yet when any one or more of these cases of partial intellectual or moral mania exists, they not unfrequently, in progress of time, grow into general mania, and even where this is not the case, that what seems sanity upon general subjects is often disturbed by exceptional evidences of mental aberration, consisting in acts and conduct evincing mental disturbance generally. And some of these existed in the case under discussion, and which we will notice as corroborative of the proof of mental delusion. First we notice his manner in the interview with Brunker concerning the paternity of his children, noticed above. There was that in his manner which led the witness to think that he was crazy. Again: Mrs. Chaney says he acted like he was not in his right mind; he blew in his coffee to take the poison out; he acted foolish; and when he denied the paternity of the girls she paid no attention to it, as she did not know whether he was a fool or joking. (Rec. p. 256.)

Again the witness Banta, in Hancock county, says he acted foolishly, and talked foolishly constantly. He sometimes talked sensibly, and again foolishly. He also says that deceased went out into the sun bare-headed, and acted in such a way as to excite suspicion, and he was set to watch him. He then took his hat and went far out into the woods and stopped and talked to himself. He said: "*Poor child!*" And the witness said the deceased was not at all times in his right mind. (309.): Again both Squire Davis and his wife state that he acted foolishly; carried in a carpet bag a large sum of

money; acknowledged he was not fit to keep it, etc. They both testify that they did not consider him at all times of sound mind. (Rec. 314-322.) Again: the evidences of unfounded fear, suspicion, apprehension of being arrested, nay, injured, are persuasive of some mental derangement.

Dr. Franklin testifies that when he saw the deceased he wore an anxious expression of face, acted suspiciously towards every one, treated his wife with marked suspicion and want of confidence, and was, apparently, distrustful to everyone. (Rec. p, 555–6.) Earlier his son Robert says he was taciturn, avoided conversation, and often declined to answer, and seemed not in his *right mind.* (Rec., p. 275-6.) Again: one of the defendant's own witnesses testifies that although well acquainted with the deceased, and generally considering him sane, his actions and conduct led him to doubt his being right. The last time he saw him his conduct, as described by this witness, was wild, strange and suspicious. (Rec., p. 755-6-7.) Again: Mrs. Bryan says the deceased told her that his daughter Sallie wrote for him to come for her, and when he got there he was told he had better leave, that it was his daughter's intention to have him arrested. (Rec., p. 888-890.) Again: a year or two after that, Sallie and her husband went to see him. As soon as they came into the house she and her husband wanted to get up a quarrel. * * * * He thought at one time he would take his pistol and shoot the husband, but he took a thought that his business was to make a fuss, get him mad, have him arrested, or something of that

sort, (Id.) This statement is corroborated by Bryan in almost exact language, and by both Bell and Lowry. Why this apprehension of arrest? Why this absurd story about these conspiracies to have him arrested, when it appears that up to the time of this visit, and indeed even afterwards, he claimed the accused daughter as his only child, and frankly admitted to Bell that the quarrel was with the wife and daughter, whom he had falsely told that the Hyatt woman was not with him. (Rec., p. 204-205.) Now Bryan and wife give page after page of testimony of the rehearsals of the deceased of bad behavior of Bob; and Bell testifies in *extenso* upon the same subject, yet not one word is anywhere said by him about his son's having any designs upon his life himself or about any attempt to procure others to harm him. But he tells Esquire Davis. in Hancock county, that his former slave, an old negro man, had told him that Bob had tried to hire him to kill deceased, but that the negro had told him, and refused to be hired. (Rec. p. 322-3.) Now it is true that Alfred Kennedy swears that the negro told him, deceased, so in his presence, but the negro absolutely denies the fact, and so does Bob in the most indignant manner. (Rec. p. 275.) And taking into consideration the manifest indisposition of Kennedy to tell the truth, and the unnaturalness and improbability of such an act, it is clear that it was the wild imaginings of the deceased and not any real threat or pretense of such a thing. And it appears that he was so much influenced by fear, that when he was in Kentucky on business, in 1872 and 1873, he hired a man to travel with him,

and paid him wages. (Rec. p. 762-3.) And if all that is pretended of threats was true, and it is not, this fear was abnormal, and evinced mental aberration. All these facts tend to corroborate the position as an inference of fact, independently of the tests of science, that these untrue statements concerning the paternity of his children, repeated through a series of years, were the result of mental delusion.

But if we could believe a man so depraved and so lost to all moral principal and all domestic obligations and affections, as thus to violate his marital vows, and, from mere depravity, thus to seek to degrade his offspring after such a life and character as are shown for him up to the beginning of this moral defection, it shows such a moral perversion, such a perversion of feeling and action as to place the deceased in a mental condition as incapable of disposing of his property so as to prevent the succession thereof to his children, who were the objects of this perversion of feeling and action, as if he was the subject of mental delusion. Corroborating this moral perversion are many scraps of evidence. Instance his lying to his daughter Sallie, in reference to the presence of Nan. Hyatt; his untrue statement as to what he offered his family, fifteen or twenty thousand dollars or the *farm*, and they took the latter, worth six thousand dollars. And numerous other evidences of a disposition to state that which was untrue.

This species of moral perversion, when amounting to mental unsoundness, in the absence of mental

delusion, is well described by Dr. Maudsley, thus: "The intelligence is often acute enough, being not affected otherwise than by being tainted with the morbid feelings under which the persons think and act; indeed, they often show an extraordinary ingenuity in explaining, excusing or justifying their behavior, exaggerating this, ignoring that; and so coloring the whole as to make themselves appear the victims of misrepresentation or persecution."

But the evidence here shows both moral perversion and mental delusion, and it shows very fully what Chief Justice Cochburn very accurately describes as the mental condition which disqualifies a man from a legal disposition of his estate. He says: "If the human instincts and affections, or the moral sense become perverted by mental disease; if insane suspicion or aversion takes the place of natural affection; if reason and judgment are lost, and the mind becomes a ~~party~~ tovey to insane delusion, calculated to interfere and disturb its functions, and to lead to a testamentary disposition due only to their baneful influence, in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand." (L. R. 6 Eq. 549, quotation in Maudsley 115–117.)

Thus far we have confined this argument and statement of prominent points of evidence to the discussion of the question of mental unsoundness from a common sense standpoint, quoting as the basis of the legal and scientific propositions laid down, such legal and medico-legal authorities as have

been available, but leaving out of the question the expert testimony.

EXPERT TESTIMONY.

Although some question was once made as to the admissibility of the testimony of physicians who were not connected with the treatment of mental diseases as a specialty, yet that controversy is at an end, and it is found in practice that many physicians, who are not specialists, are quite as competent to testify as are others who *are specialists.* And this is especially so where the witness is the attending physician. (Baxter vs. Abbott, 7 Gray, 71, 1 Redfield on Wills 152, section 15 Sub. 29.)

We have examined *ten* experts in this case, of various ages, training and experience, and they speak so uniform a language that we need not attempt here to refer to them all in detail. We will, however, before presenting the hypothetical case, make a few suggestions upon the testimony of one or two of these expert witnesses.

First is the testimony of Dr. John W. Franklin, who treated the deceased for two or three months, a little more than a year before his death. He describes him as having an anxious look, a suspicious or distrustful manner, a bilious temperament, a quickened pulse, about ten above a healthy pulse, a constipated habit, and in bad health, having chronic gastrics. (Rec. p. 555—563.)

All these conditions are favorable to insanity, under all the evidence of the experts as well as the medical authorities. Dr. Ray, quoting Dr. Rush,

mentions the pulse as "* * a valuable means, in connection with others, of arriving at correct conclusions in doubtful cases." (Ray sec. 350.) And so is constipation, almost a universal accompaniment of mental disturbance, and so of the air of suspicion which seemed to characterize the action of the deceased.

Dr. Franklin, putting the facts he saw and his observations with the hypothecations of the history of the man, states that he was a monomaniac upon the subject of his domestic relations, and morally insane.

We give the deposition of Dr. Lining entire, with the exception of the hypothecation and the cross-examination. The hypothecation is the same as the one set out below, with the addition of the statement of the proof of hereditary insanity, which is wanting in all the others except Dr. Franklin's, in which the hypothecation is substantially the same as in Lining.

DR. LINING'S TESTIMONY IN CHIEF.

Question 1. State your name, age, residence, and occupation.

Answer. Charles Edward Lining, 43 years of age, Evansville, physician and surgeon.

Question 2. Where did you receive your medical education, and of what institution are you a graduate?

Answer. At the University of Virginia, and at the Medical College of the State of South Carolina, of which latter I am a graduate, and was formerly an assistant surgeon in the United States Navy.

Question 3. State how long and where you have practiced your profession.

Answer. The large majority of the time for 22 years; in the United States, in South America, and on shipboard.

Question 4. State whether you possess any knowledge upon the subject of insanity, and if yea, how the same has been obtained?

Answer. Yes, sir; I possess some knowledge, chiefly from books; during my practice I have had to treat cases of insanity.

Question 5. Please define insanity in its general acceptation.

Answer Insanity is disease of the brain, in which the intellectual and moral faculties are perverted or destroyed.

Question 6. What is general mania?

Answer. General mania is general perversion of the faculties of the mind, characterized by excitement.

Question 7. State whether general mania is the same as insanity, or whether it is different, and if it is different, define the difference as nearly as you can.

Answer. In a general way insanity and mania are often used as synonymous terms; strictly speaking, insanity includes all diseases of the brain, including dementia, mania, et cetera, while mania is that perversion of the brain characterized by excitement.

Question 8. In your last answer you used the word brain, both as to the extent of insanity and

mania. Do you mean to say brain in those connections?

Answer. By brain I mean the functions of the brain.

Question 9. What is monomania?

Answer. Monomania is a disease of the brain, characterized by delusion on one subject, or certain trains of thoughts or ideas, while on other subjects the mind may be clear?

Question 10. State whether what is usually termed in books, partial mania, is the same as monomania, or whether it is a different thing.

Answer. I consider them the same.

Question 11. How is mania divided in relation to its effects upon the intellectual and moral nature of the mind? State the simple subdivision in that relation.

Answer. Into intellectual, which may be general or partial.

Question 12. Describe intellectual mania, general and partial.

Answer. Intellectual mania is a disease of the intellectual faculties, or those faculties which acquaint us with external objects, the relation of cause and effect, et cetera, while moral mania is a perversion of the feelings, passions, habits, temper, et cetera. Partial intellectual mania is the same as moral mania, already described.

Question 13. State whether intellectual mania is characterized by any distinctive peculiarity which is absent in moral mania, and if yea, state what it is.

Answer. Yes; intellectual mania is characterized by delusion.

Question 14. State whether moral mania, general or partial, may or not exist without delusion.

Answer. It may.

Question 15. What is the effect, if any, of hereditary taint in predisposing persons descended from ancestors afflicted with insanity, or other kindred diseases, to like diseases.

Answer. Hereditary insanity is the most powerful predisposing cause to insanity and kindred hereditary diseases, such as epilepsy.

Question 16. If there be hereditary epilepsy or insanity, may the one in the ancestor produce the other in the offspring, and if yea, why?

Answer. They may; an epileptic parent may have one or more of his children insane, and one or other of the descendants of insane parents may be epileptic, on account of the relationship between the two diseases.

Question 17. What is the difference between monomania and eccentricity?

Answer. A monomaniac has an insane delusion on one point, or on any one subject or train of ideas; while an eccentric person, though he may have ideas differing from that of the usual social standard, yet he has always had those ideas consistently.

Question 18. State what are the usual manifestations of partial moral mania, and state whether it ever manifests itself in the perversion of the domestic affections.

Answer. Partial moral mania is a perversion of the feeling, habits, et cetera, on some particular

point, and it does manifest itself occasionally in a perversion of the domestic affections.

Question 19. Does hereditary predisposition necessarily develop in the child from the parent directly, or may it be latent in the first generation and develop in a subsequent generation?

Answer. It may not necessarily manifest itself in the first generation, but may develop itself in a subsequent generation or branches.

Question 20. As an inference to turn the scale in a doubtful case, state whether the converse of the proposition you have stated will apply; in other words suppose the insanity of the ancestor is the subject of controversy, would the insanitary of the child afford any evidence or inference as to the insanity of the parent.

Answer. It might, as a corroborative inference.

Question 21. State whether partial moral mania is consistent or inconsistent with usual intelligence and sanity upon all other subjects except the subject of the particular perversion.

Answer. It is consistent.

Question 22. State whether the opinions you have given in this deposition are sustained by medical authority, and if so, state whether you have recently consulted such authorities, and if yea, name them.

Answer. Yes; they are sustained by some of the chief medical authorities, and I have lately consulted Dr. Maudsley, Dr. Ray, Wharton and Stille, and Dr. Guy.

Question 23. To what class of unsoundness of

mind would you assign his mental condition from the facts hypothecated above.

Answer. That he was a monomaniac in regard to his family relations, and morally insane in his general conduct.

Question 24. Suppose a long life of ordinarily healthy condition of the domestic affections, a man should suddenly, and without any adequate physical cause, or any rational cause, and without mental delusion become totally alienated from his family, wife and children, so that he abandoned them: separated from them for seven years, till his death, and constantly traduced and abused them on every occasion, from the commencement of the alienation to the time of his death, and finally, immediately previous to his death, attempted to disinherit them, and yet, in reference to the ordinary affairs of life, disconnected with his domestic relations, he was sane and intelligent. What would you say of his mental condition?

Answer. That he was laboring under moral mania.

Below we set out, in parallel columns, the hypothecations and a synopsis of the evidence upon which the same are based.

HYPOTHECATION, AND ABSTRACT OF EVIDENCE.

(1.) Suppose a man residing in Kentucky should live with his wife and family for 36 years, and raise six children as the fruit of the marriage, until his youngest child was 18 years old, and he was sixty years old; suppose that during all this time he never complained of any want of constancy, fidelity or chastity on the part of his wife, nor expressed any doubt about the paternity of his children?

(1.) Mrs. Chaney testifies to the proposition number (1) and is corroborated by Bob, her daughter, and all other witnesses, and especially by Brunker, clearly proving that there was never any such a charge till the youngest daughter was eighteen, and about two years before the separation, and the daughter says he always treated his children well till then, and there is no counterproof. (Rec. p. 287.) Says Bunker: "Before this misfortune, Mr. Chaney was a good man and the girls were good girls, and are good girls now." * * Mr. Chaney was a man of very good character, they (the girls) have very good characters themselves. Hardy. (Rec. p. 144.)

(2.) And suppose about this time he should contract a criminal intimacy with another woman, and suppose that about the same time he should tell some of his neighbors, in a confidential way, that one and then another of his children was not his, telling one that a son was the child of Jones, another that a daughter was the child of Smith, or that a son was no kin to him, until most of his children were involved in the charge of illegitimacy.

(2.) The criminal intimacy is not denied. The denial of paternity is proved. (Rec. p. 291—2.) It further appears, by the testimony of innumerable witnesses of good character, and by the testimony of Mrs. C. herself, that there is no foundation for this charge.

(3.) And suppose that quarreling with his family he should leave them and go to Indiana with his mistress, and stay several months, during which time he should tell the persons with whom he became intimate, and all with whom he talked upon the subject, that there was but

(3.) The separation from the wife is admitted, but it is assumed that the whole family were involved in this separation, but there is no evidence that any one but the husband and wife, and the son, as her trustee, were even consulted or ever participated in the arrange-

one of the children his. And suppose that pretending to have divorced his wife he should marry his mistress, with whom he should go to Tennessee and live four years, and then quarreling with her should put her away, and a few months afterwards die. And suppose that during his four years residence in Tennessee he should have told the friends with whom he became intimate, either that all, or all but one of his reputed children were not his, saying to one friend that he "neither wanted to see them in this world nor in the next?"

(4.) And suppose that this charge of illegitimacy was utterly without foundation, in fact, and without rational evidence to support it, and yet suppose the patient was in general, and in reference to all other matters, save those connected with his family, intelligent and rational. What would you say of his mental condition?

ment. The repetition of the charge of illegitimacy is proven by Davis and wife, and Banta, above cited. And there is no controversy about the pretended divorce. (Rec. p. 332.) And the separation with the wife, and death, are in proof by both sides, and not denied. (Rec. p. 566.) His statements concerning the illegitimacy of his children in Tennessee, are proven by Bryan, Mrs. Bryan, A. E. Bell and Lowry; "he neither wanted to see them in this world nor the next," is a quotation from Mrs. Bryan's testimony.

(4.) This proposition is proved by the presumption of law that those born in wedlock are legitimate, by the absence of all proof of any foundation of the charge, and by the recognition without denial or disturbance for over thirty years as to some and eighteen years as to all of them. Besides the denial of Mrs. Chaney and the overwhelming proof of good character by his neighbors.

To this question we have the following answers:

Dr. G. B. Walker, 47 years a physician, a graduate of the Medical College of Ohio, a year in charge of an insane hospital, says: "The delusion in reference to the legitimacy of his children, under the circumstances named, would be an evidence of insanity." (Rec., p. 462-4.)

Dr. C. P. Bacon, a graduate of the University of Pennsylvania, of sixteen years practice as a physician, says: "I should say that he was laboring under

that species of insanity known as monomania." (Rec., p. 407–411.)

Dr. W. S. Pollard, a graduate of the Miami Medical College, Cincinnati, Ohio; with practical experience in insanity, says: "If I knew a person's life, as stated in the question just asked, I should certainly say that he was not sane on those subjects." (Rec. p. 428–9.)

Dr. W. A. Wheeler, a graduate of the Medical School of Maine, and also of the College of Physicians and Surgeons, at New York City, attended clinical lectures at the Blackwell's Island Insane Asylum, says: "I should say that he was afflicted with monomania." (Rec., p. 446-49.)

Dr. H. G. Jones, a graduate of Starling Medical College, Columbus, Ohio, having practiced thirty years, says. "I would say he was a monomaniac, with your history as you give it there." (Rec., p. 477-80.)

Dr. A. M. Owen, a graduate of Bellevue Hospital Medical College, New York, and of the University of Virginia, with practical experience in hospitals in New York, says: "I should say he was a monomaniac on the subject of his family or children, or legitimacy of his children," (Rec., 494—7.)

Dr. C. E. Lining, a graduate of the University of Virginia, and of the Medical College of South Carolina, served in the U. S. Navy as assistant surgeon, practiced profession twenty-two years, says: "I should say that certainly he was of unsound mind." (Rec. 574-76.)

Dr. Orpheus Evarts, a graduate of the Indiana Medical College, and Rush Medical College, Chicago, with honorary degree conferred on him by the University of Michigan, and nine years superintendent of Indiana Hospital for the Insane, says: "Assuming that state of affairs to be true, and no other explanation to be given, I should say the man was of unsound mind." (Rec., p. 356-58.)

Dr. James H. Woodburn, who was for three years Superintendent of the Indiana Hospital for the Insane, while in that capacity, attended annual conventions of Superintendents, and heard the subjects discussed by the leading specialists of the country. says. "In my answer to this hypothesis I go back to the definition of insanity, as given by me in this deposition, and say that if there is no adequate cause to account for the changes of conduct in this man, he was undoubtedly insane." (Rec., p. 386-390.)

Also Dr. Franklin, a graduate of Transylvania University, Ky., the attending physician of deceased for a time, says, that from his knowledge of the man and the history given of him in this hypothecation: "I should say he was a monomaniac, and morally insane." (Rec., p. 556-58.)

In addition to these, take the answer of Dr. Henry Jameson, of Indianapolis, a graduate of Bellevue Medical College, New York, with a hospital practice in New York City, having had charge of the idiot department of said hospital for several years, and having charge of the Marion County Asylum for four years, with an average of sixty

cases of insanity all the time, called by respondent, in answer to ~~some~~ the same question (Q. 34 cross-ex.) says: "I should question his soundness of mind very seriously. Taking all the points that you give into consideration it would point strongly towards an unsound condition of mind." (Rec., 610-613.

Also, J. C. Walker, a graduate of the Cincinnati Medical College, and the University of Louisville, Ky., with hospital practice, Professor of Nervous Diseases in the College of Physicians and Surgeons, Indianapolis, called by respondent, in answer to the same question, (Q. 26 cross-ex.) says: "I should think there was a species of insanity there." (Rec. 637-639.)

The second hypothecation, contains an assumption that the first is true, and states additional facts; we insert it, with its verification, in the testimony, in parallel columns. It is as follows:

(1.) And suppose that in addition to the facts stated in the last interrogatory being true, the patient should tell an unfounded story, that his son had hired a former slave of the patient to murder him, bu tthat the negro had exposed the plot. (2.) And should seem afraid to travel in the neighborhood where his son lived for fear of being murdered, though there was no foundation for such fear. (3.) And should seem apprehensive at times that his children were plotting to have him arrested. (4.) And should occsionally act wildly and foolishly, blow in his coffee to expel the poison, talk incoherently, go into the

(1.) That this story was told, there is no controversy. That the story was unfounded we have endeavored to show by reference to the testimony of the negro, and of Bob Chaney, both denying it, the improbability of it, and the fact that with all his talk of grievance he never told it in Tennessee to any one, and never but once anywhere, and then in a wild, bragging sort of way. (2.) His fear to travel in Kentucky is proven by witness Kennedy, above referred to, and the fact that he hired the younger Kennedy to go with him is proven by him. (3.) The fear of arrest, by procurement of his children, is apparent by the

woods alone and declaim and talk wildly to himself. But in his general deportment in reference to all matters of business disconnected with his family he should seem rational and sensible. What would you say of his mental condition?

testimony of Mrs. Bryan above referred to, and that this fear was groundless is clear enough, otherwise some effort would be made to prove a foundation for it. This is quite a different thing from the service of process, and the deceased knew the difference, and though he may have tried to avoid service of process this is quite another matter. (4) We have alluded to deceased acting wildly and foolishly, declaiming, etc., as herein hypothecated, and it is proven by Mrs. Chaney, Bob, the negro servant, and Banta, and Davis and wife, in Indiana. (See references above,)

To this history all the experts to whom it is propounded, including nearly all the physicians examined, attribute insanity, and Dr. Evarts, a specialist and profound thinker and observer, says: "I should say that that condition, without reference to the former question, or with reference to it, was that of an insane man. Always assuming that there was no foundation for his assumptions, and that he was not feigning insanity. (Rec. p. 358.)

The third hypothecation is also cumulative of the first, and is also put to most of the expert witnesses:

(1.) Again assuming the facts supposed in the interrogatory before the last, to be true, suppose, in addition, that the patient being in the possession of about $30,000 worth of property, he should, two months before his death, attempt to give it all to his nephew and niece, leaving nothing to his

(1.) The testimony shows the farm in Tennessee worth about seven thousand dollars. The certificate in controversy is twenty-three thousand five hundred dollars, and deceased had on his farm near a thousand dollars in property. The certificate is claimed by Basket, the farm and household goods

children or heirs at law, who were all poor, excepting a small sum not then in his possession, not exceeding one thousand ($,-000) dollars each, which he should simply leave undisposed of, and though he seemed intelligent on matters generally, yet suppose he constantly expressed his hatred for his children, and declared that they were not his, and that his wife was a bad woman, and they should never have any of his property. What would you say of his mental condition?

by Mrs. Bryan, and the farm by Bryan, and Chaney certainly attempted to give all this away, (Testimony of Hassel in chief, etc., cross-ex., R. p. 563–66.) and left only the personalty in Kentucky, worth five thousand dollars net. (Baily, Rec. 81–87, 88.) The children are all poor, not worth anything, (Rec., p. p. 112–113.) and these facts are persuasive to the experts of the unsoundness or uuhealthiness of the mental condition of the deceased. And as said by Ch. J. Cochburn, in the opinion from which we have already quoted:

"The presumption against a will (or gift) made under such circumstances becomes additionally strong where the will (or gift) is, to use the term of the civilians, an *inofficious* one, that is to say, one in which natural affection, and the claims of near relationship have been disregarded." The pretense in the hypothecation of defendant's, that deceased had given to the widow and children a large sum, is absurd. The farm he gave his wife, with remainder to his children, which, as far as the evidence shows, was without their knowledge or consent, was not worth over $9,000 at the outside; indeed, it only sold for $6,000, and the whole property which the wife and children got, and will get by the act or tacit assent of the deceased, is less than half the present value of the certificate in suit.

And yet in order to justify this *inofficious*, this unnatural, this irrational and insane attempt at a division, and to get the witnesses to tolerate it as a rational disposition, learned counsel for defendant,

in their counter hypothecation, raise and lower sums and ignore admitted facts *ad libitum*. They reduce the face of the certificate fifteen hundred dollars, raise the home farm from about $7,000, the average of the proof, to from $15,000 to $20,000, and put the Tennessee farm, worth $7,000, at $9,000, and charge it to the children, notwithstanding defendant admits it was devised to Mrs. Bryan by an olographic will, which is in keeping with the acts and conduct of the deceased in other respects.

To this last hypothecation of ours all the experts to whom it is propounded, answer that it is cumulative testimony of the unsoundness of the decedent's mind.

COUNTER HYPOTHECATION OF RESPONDENT.

To meet our several hypothecated cases a counter hypothecation was put to most of the experts. But though, as we have already intimated, it is made up mainly of mere exaggeration or facts not found in the evidence. Yet this is not the worst defect, for, as shrewdly observed by both Dr. Wheeler and Dr. Lining, the very point of divergence from a healthy condition of the mental faculties to that of a disturbed, diseased and distracted condition is obliterated or obscured, and as is well observed by Dr. Jameson, the majority of the facts are those of a sane man, while the exceptional ones are not wholly inconsistent with sanity.

But if the whole case depended upon a comparison of the evidence, with the hypothecations of the respective parties, we might well abide by the

result. A few of the points which are omitted or misstated in the hypothesis put to their witnesses by counsel for respondents, may be mentioned: 1. They totally forget to state, what is proved by us repeatedly, that up to the intimacy with Mrs. Hyatt deceased treated his family well; on the contrary, they got along badly. This has no foundation, except the statement of Mrs. C., that he was always hard to get along with, and the recital in the deed, already sufficiently discussed. 2. They fail to note the good character of deceased before the scandal, and the degeneracy afterwards, already considered. 3. They seek to show by intimation, as they do by direct statement in the cross-examination of the defendant's witnesses, that the daughters were involved in the quarrel between the father and mother, and embraced in the provisions of the settlement between them, which, as we have expressly shown, are totally without sanction in the evidence. 4. They assume that nothing is known in reference to the mental condition of the father of the deceased, which accounts for the fact of the idiocy of the sister, or the lunacy and insanity of the son; whereas, one Turley, who was a playmate with deceased, now an old man, well acquainted with his father for many years, says, in answer to the question of the mental condition of H. M. Chaney's father. Wm. C. says: "It was not very good; I would say he was half idiot, at least." Also, J. N. Webb, an old man, cotemporary with the deceased, knew his father well, visited his house with deceased constantly from a small boy to manhood, and often ate at his table, having stated these facts, this

question is put: "Please state what was the condition of old man Billy Chaney's mind and health during your acquaintance with him." Answer. "*His mind and health were both feeble.*" Again: "Did Billy Chaney's feebleness of mind more nearly approach to idiocy or insanity?" "I don't know that he was afflicted with either, particularly, only he never attended to any business; never knew him to attend to any business; he walked about the house and farm, and I never saw him at a neighbor's house in my life; never saw him at church in my life."

Both these witnesses are severely cross-examined, but both insist that he was weak-minded—"*physically and mentally weak.*" This testimony stands uncontradicted. It is true that Wm. B. Chaney says he knew him, and never knew anything amiss of him, but he says he does not know the condition of any man's mind, *and that it is a question no man has a right to ask or answer.* Besides this witness, is the old epileptic cousin of deceased, whose mind, as is manifest from his testimony. is affected by his disease. The testimony of his brother shows that both he and his children are epileptic, and as his grandfather and that of the deceased, are both the same, and as he, by the testimony of this witness, never came from Virginia, the presumption is very strong that there was hereditary taint reaching beyond the father of the decedent, to or beyond his father. 5. They assume, in order to show that the acts and conduct of the deceased in the division of his property were rational, that the sums left to the children and their mother are a fair division,

when, in fact, they amount to but a pittance compared with his whole estate, as has been sufficiently shown. 6. They rob all the acts of the decedent of their insane character by the mild and innocent manner of stating them. For instance, for a man to blow in his coffee to cool it, is quite innocent, but to say he does so to drive out poison, is insanity. Or for a man to talk to himself is mere abstraction, but to go out in the field bareheaded, and declaim wildly, is madness. 7. They assume the absolute truth of facts based upon the most improbable statements of deceased, which are without corroboration, and totally disproved. For instance, the statement of *Bob's* ill treatment to him. It is passing strange that if these acts of ill treatment have other foundation than the disordered imagination of deceased, that the same could not be proved by some one; but not a word of corroborative proof is given, and we cannot see why they are hypothecated. 8. And finally, as before hinted, they so dress up the history of the man as to preserve apparent identity; but leave out or vary and change the substantial points of the history so that the identity is almost, if not quite, destroyed. But having pointed out the principal points of devergence, we proceed another step.

NON-EXPERT TESTIMONY.

Many witnesses have been examined by the respondent, Basket, to prove that the deceased was rational in reference to the ordinary affairs of life, a proposition which is assumed by us at every step, and in every hypothecation. Under the modern rulings upon this subject, every man has a right, hav-

ing stated his facts, to give his opinion In this way we have the opinions of many witnesses in the various walks of life, who express the opinion that deceased was sane, but it will be noted that the only three disinterested witnesses, who lived in the house with him, express the opinion that he was not at all times sane. And they all corroborate themselves by facts, as we have seen. We lost the testimony of two witnesses, whose testimony would have corroborated these in every respect, by the death of Moffat and wife, at whose house he spent half his time in Hancock county.

Again: It is a singular fact that wherever the history of the case is given, even to a non-expert witness, as was done in several cases in cross-examinations, the uniform answer is that such a man had not a sound mind.

But while the testimony of unprofessional witnesses is competent, it is all of little value except the testimony of those who were acquainted with the particular subject of the alleged delusion.

In Seaman's Friend Society vs. Hopper, 33 N. Y. 610, a case in many respects analogous to the case at bar, *Mr. Justice Denio*, delivering the opinion of the court, at page 63, discusses this class of testimony, in such a cogent manner that we are constrained to quote it. He says: "The party propounding the will has examined a great number of witnesses, many of whom knew the deceased but slightly, and who speak of trifling transactions of business, such as purchase of provisions and articles of family marketing. This class of witnesses, when

they found him able to transact such affairs, and saw nothing extravagant or peculiar in his manner, readily pronounced him of sane mind.

"In cases involving questions of mental capacity, I have generally found opinions of unprofessional witnesses, with only a short or slight acquaintance with the party, of little value.

"If these witnesses, though not professional, have had a long and intimate acquaintance with the person of whom they are called upon to speak, and are moreover, persons of intelligence, and detail the facts upon which their opinions are founded, the testimony is often extremely useful.

"Where the mental disorder is a delusion upon one or a few particular subjects, the testimony of persons with whom he has not had occasion to speak on those subjects, is of no weight.

The considerable number of shop-keepers, mechanics and retail dealers who have been called upon to pronounce upon his capacity, have not appeared to me to overcome in any appreciable degree the testimony on the other side, which I have adverted to."

GENERAL REMARKS UPON THE EVIDENCE OF UNSOUNDNESS OF MIND.

At the close of this inquiry, conceding that the deceased was rational in reference to the ordinary affairs of life, still does not the testimony, taken altogether, show that he, in the language of Judge Denio, (33 N. Y. *supra*) persistently believed facts which had no real existence and probability, except

in his perverted imagination? And has he not conducted himself upon the assumption of their existence? If so, in the language of the same eminent judge, "he was, as to such facts, laboring under a delusion, and this delusion is insanity."

Or does it not show, in the language of Judge Redfield, both a *mental* and *moral* perversion of the deceased upon the whole subject of his domestic relations as a class, and particularly upon the chastity of his wife, and the paternity of his children? (1. Redfield 71 sec 11.) And is not the history of the deceased contained in the evidence characterized by that marked change in the modes of *thinking, feeling and acting* pointed out by all the authorities, and described by all the experts. In short, does not the testimony show a clear case of *monomania*, both moral and intellectual?

The testimony has been discussed in detail, and to generalize, to any great extent, would be but repetition. A reference to a few of the general points may suffice.

The quiet and uneventful history of the family up to the time of the introduction upon the stage of Nan. Hyatt; the good character of deceased, and all the family; the *lecherous amour* of decedent with Hyatt; the immediate appearance of the symptoms of mental perversion; the wild charge of adultery and bastardy; excessive sexual desire and indulgence, are the fruitful source of *insanity*. (Drs. Jameson and Walker, experts for respondent.) Unfounded suspicions of marital infidelity are an unmistakable evidence of mental aberration, and very common.

(All the experts.) Add to this the weak-mindedness of the father, the idiocy of the sister, the insanity of the son, and the epilepsy of the collateral kindred, showing the probable anterior existence of hereditary taint.

Then the occurrence of foolish behavior, testified to by Mrs. C.; the avoiding of company, and taciturnity referred to by Bob Chaney; the successive garrulousness and levity with reticence and moodiness testified to by Mr. and Mrs. Davis and Banta, at Greenfield; the general foolish behavior mentioned by the same witnesses; the continual reiteration of the slanders, and the wild and foolish talk about his family to Bell, Mrs. Bryan, Dr. Bryan, Lowry, and Dorris, in Tennessee; the constant fear of arrest; bringing his money to Indiana to hide it, when he had lands and money in Tennessee and Kentucky; his traveling through Kentucky in the night to avoid arrest; and last, but not least, his effort in some sort of clandestine and unnatural way, without the advice of counsel; without any witness, and without regular formality, not only to give away a handsome fortune, rendering his own offspring almost penniless; but he performs it all in a most extraordinary manner. Two months before the death, the certificate is alleged to have been secretly handed over to the alleged donee, the assignment and delivery being made in a private room without a witness. When decedent dies he has neither money, goods nor lands. The certificate is found with the nephew. An old book contains a devise of a seven thousand dollar farm in one pencil mem-

orandum, now the subject of litigation; in another pencil memorandum, in the same book, a gift of the household goods to the same niece, and by another the farming stock and property are given to her husband. Are these the acts of a sane man upon this subject? We answer no. Are they acts of a merely eccentric man? We answer no. The difference between the acts of the one and the other in this class of cases is well put by Judge Redfield. (1 Redf. on Wills, 84 sec. 11 sub. sec. 17.)

Again: This case shows a degree of unanimity in expert testimony rarely seen. Twelve physicians are examined, ten for appellees and two for the appellants. They speak a uniform language. And they all, upon the hypothecation, which is far below the testimony, pronounce the case one of *unsoundness of mind*, and *all* corroborate their theories by their general testimony, and are not shaken in cross-examination either by specific questions or counter hypothecation, and one of the very strongest depositions for appellee is that of Dr. Jameson, taken by appellant.

ASSUMPTIONS ON THE FACTS OF RESPONDENT'S THAT THERE IS AN ADEQUATE EXTERNAL CAUSE.

To all this extraordinary history as to the modes of thought, feeling and action, and against all this expert testimony, it is assumed that there *is an adequate external cause*. An effort is made to show this by hypothecation, the failure of which has already been considered. A like effort is made, with much ingenuity, in the cross-examinations, and especially of Dr. Evarts, but without success.

The first ground, apparently taken, is that the whole of his conduct was assumed, or in other words that there was no delusion. All the testimony contradicts this theory. Besides the answer of Drs. Evarts and Lining, already alluded to, the fact that he made the statements in an apparently unpretentious and private way, not in anger, not in justification of his conduct. And then, after he had fallen out with Sallie, whom he all the time claimed as his daughter, he still claimed her. Why claim *one* all through the history, and after she had fallen out, if he did it from mere depravity? Then why the disinherison? Nothing in the testimony but the bare assumption of counsel in hypothecation, affords a shadow of justification for it. In accordance with the doctrine laid down in all the authorities, this act is a strong circumstance to show unsoundness of mind, and to rebut such a presumption, with all the facts shown by complainants, the respondent should show a rational act done in a rational manner, which he has not done.

We submit that we have sustained all the positions with which we set out, viz:

1. That the legal and equitable title of the certificate remained in the decedent till his death, and passed to the appellee; because the alleged assignment and delivery being testamentary passed no title legal or equitable.

2. The decedent was not in the apprehension of death, then imminent, when the certificate is alleged to have been indorsed and delivered, and therefore there was no *donatio causa mortis*.

3. The decedent was a person of unsound mind at the time of the alleged indorsement and delivery of the certificate. For all these reasons the decree of the Circuit Court should be in all things affirmed.

ASA IGLEHART,
JNO. E. IGLEHART,
Counsel for Appellee.

APPENDIX.

Opinion of the Circuit Court.

HASSELL vs. BASKET.

United States Circuit Court, District of Indiana, October Term, 1878.

GRESHAM, J.:

The bill in this case alleges that Hillery M. Chaney, a citizen of Sumner county, Tennessee, on the 8th day of September, 1875, deposited in the Evansville National Bank, at Evansville, Indiana, $23,514-70, taking a certificate of deposit therefor; that in January, 1876, said Chaney suddenly died, and the plaintiff was appointed his administrator; that the defendant, Martin Basket, who was a nephew of said Chaney, by a fraudulent combination with one Bryan, whose wife was a niece of said Chaney; obtained possession of said certificate of deposit, and refused to surrender the same on demand; that no consideration of any kind passed from said defendant Basket to said Chaney for said certificate; that said Basket claimed to hold the same by gift from said Chaney, but at the time of such alleged gift, and for a long time previously, the said Chaney was of unsound mind. The na-

tional bank, its president and cashier, and Messrs. Shackelford and Richardson, attorneys, who as the counsel of the defendant, Basket, have possession of the certificate, are made defendants.

The defendant, Basket, by his answer admits the possession of the certificate, and alleges that the said Chaney, sixty days before his death, then being in full possession of all his mental faculties, but in apprehension of death from a disorder with which he was then suffering, with his own hand wrote and signed the following certificate, to wit:

> "Pay to Martin Basket, of Henderson, Ky., and no one else, then, not till my death. My life seems to be uncertain. I may live through this spell, then I will attend to it myself.
> (Signed) CHANEY."

And delivered said certificate so endorsed to the defendant, Basket; that said Chaney died of said disorder, and said certificate, so indorsed, remained in his (Basket's) possession until he placed it in the hands of his counsel, the defendants, Shackelford and Richardson; and that the certificate was a gift to him in trust, as well for himself as for his brothers and sisters, at his option.

The bank and its officers answered, asking protection of the court in the payment of the money. Basket filed a cross-bill, setting up the gift as in his answer, which the plaintiff answered, traversing the material allegations. General replications were filed to all the answers.

For several years before his death Mr. Chaney had been in failing health, complaining of dyspepsia, and physicians had treated him for that disease. During the sixty days that elapsed from the delivery of the indorsed certificate to Basket until his (Chaney's) death, on the —— day of January, 1876, he was generally up about his premises looking

after his business, as he had done for months previously. It appeared from a *post mortem* that he had also suffered from consumption. The testimony also conclusively shows that, at the time the certificate was delivered by him to Basket, the said Chaney was not *in extremis*, and that he did not act in the apprehension of immediate death. On this point there is no serious controversy.

His domicil being in the State of Tennessee at the time of his death, the laws of that State determine the succession to his personal property. In construing the statutes of Tennessee, relating to wills, the Supreme Court of that State has held that nuncupative wills must be made *in extremis*. Hatcher vs. Millard, 2 Cold , 30; Gwin vs. Wright, 8 Humph., 639. Section 2,165, of the Tennessee code, declares that no nuncupative will is good unless proved by two witnesses present at the making thereof, who were specially requested to bear witness to it by the testator. The indorsement on the certificate has never been probated as a testamentary instrument according to the requirements of the laws of the State of Tennessee. It follows that the defendant, Basket, cannot claim the money as a testamentary gift.

The plaintiff, as administrator, is, therefore, entitled to the fund in controversy, unless it belongs to the defendant, Basket, as a gift *causa mortis*. It would seem that the courts and law-writers have not always been clear in speaking of gifts of this kind.

In Kent's Commentaries, Vol. 2, mar. p. 444, we find the following: "Such gifts are conditioned like legacies, and it is essential to them that the donor make them in his last illness, or in contemplation and expectation of death, and, with reference to their effect after his death, they are good, notwithstanding the previous will, and if he recov-

ers, the gift becomes void." In Story's Eq., sec. 605 and 606, note 1, the gift is thus defined: "It is properly a gift of personal property by a party who is in peril of death, upon condition that it shall presently belong to the donee in case the donor shall die, but not otherwise. To give it effect there must be a delivery of it by the donor, and it is subject to be defeated by his recovery or escape from the impending peril of death. If no event happens which revokes it, the title of the donee is deemed to be directly derived from the donor in his life-time, and therefore in no sense is it a testamentary act."

Williams, in his treatise on Executors, in speaking of this kind of gift, Vol. 1, page 651, says: "First—The gift must be with a view to the donor's death. Second—It must be conditional, to take effect only on the death of the donor, by his existing disorder. Third—There must be a delivery of the subject of the gift." In *Nicholas* vs. *Adams*, 2 Whart. 17, the opinion of the court was delivered by Chief Justice Gibson, who says: "*Donatio causa mortis* is sometimes spoken of as being distinct from a gift *inter vivos*; the former having been sometimes supposed to be made in reference to the donor's death, and not to vest before it, but inaccurately, as it seems to me, as this gift, like every other, is not executory, but executed in the first instance by delivery of the thing, though defeasible by reclamation, the contingency of survivorship or deliverance from peril. The gift is consequently *inter vivos*." Gifts *causa mortis* must be of personal property of choses in action actually delivered by the donor, to the donee, in apprehension of approaching death from an existing disorder, or other impending peril, without any complete intermission. But without further effort to define such gifts, it is sufficient to say that they are not good and are never upheld without certain essential requisites,

one of which is delivery, actual or constructive, to the donee, or some one in trust for him, of the subject matter of the gift. If the subject of the gift be capable of actual delivery, the delivery must be actual, Such gifts afford tempting opportunities for fraud, and, therefore, the Roman law requires them to be executed in the presence of five witnesses. And, inasmuch as delivery lessens the opportunity for fraud, it has always been held an absolute requisite to their validity. Money on deposit may be delivered by a delivery of the certificate of deposit, provided there be the intention at the time to transfer to the donee the dominion and ownership. It is now settled that choses in action, whether negotiable or not, may be the subjects of gifts *causa mortis*. Brunson vs. Brunson, Meigs' Rep. 633; Brown vs. Moore, 3 Head, 671; Meach vs Meach, 24 Vt. 591; Hanson vs. Millett, 55 Me. 184; Cutting vs. Gilman, 41 N. H. 151."

The money itself was not delivered to Basket, nor was the certificate so assigned to him as to enable him to get possession of it. With the certificate, as indorsed, he had no right to demand the money from the bank. If, on his demand, the bank had paid the money, such payment would not have protected the bank against another demand by the donor. The indorsement was not of such a character as to enable him herewith to reduce the money to his possession. He could not, by virtue of the indorsement, have compelled the delivery of the money to him by the bank during the life of the donor. The donor, by the indorsement, had not parted with the possession or dominion of the property. It was still under his control. The language of the indorsement is certainly inartistic, but its meaning is patent. In legal effect it is: "If I die in my present illness, this certificate of deposit shall belong to Martin Basket. When I thus die, and

not before, it shall be paid to him." With this clear intention of the donor not to part with his money as long as he lived, it will not do to say that delivery of the certificate was a constructive delivery of the money evidenced by it.

But it is said that the subject of a gift *causa mortis* vests in the donee only at the death of the donor, and that therefore, the condition expressed in the assignment would have been delivered with a blank endorsement, or no indorsement at all. It must be conceded that some of the authorities seem te support this view.

A will is the disposition of one's estate, to take effect after his death. Any disposition of property to take effect upon the death of the owner or donor is testamentary. It is of the essence of a bequest that it take effect on the death of the testator. It appears by the very terms of the assignment that no present title or interest in the money could pass to the donee during the life of the donor. No instrument of writing can be both a last will and testament and a gift *causa mortis*. The indorsement was testamentary in character, and if it had been properly executed according to the statutes of Tennessee, it doubtless might have been probated as the donor's will. There is a wide difference between a legacy and a gift. Both possession and title must pass to the donee to constitute a gift. This applies as well to gifts *causa mortis* as to gifts *inter vivos*. This title must pass *inter vivos*, or it never can pass, but will go to the donor's legal representative. In a gift *inter vivos*, the donor reserves no right of revocation; in a gift *causa mortis* he does. The donor of a gift *causa mortis* holds the thing given not as bailee of the donor, but as present owner on the condition attached to such gifts. A gift *causa mortis* vests in the donee a present but inchoate, or defeasible title until the happening of

the event necessary to render it absolute, and therein it differs from gifts testamentary and *inter vivos*. This question is discussed in Gass vs. Simpson, 4 Cold., Tenn. 393. "The property," say the court, "must pass at the time and not be intended to pass at the giver's death. * * * At the death of the donor title becomes complete and absolute from the date of the gift, and that without any consent or other act on the part of the executor or administrator; consequently, the gift is *inter vivos*." Duncan vs. Duncan, 5 Littell, 12. In Parish vs. Stone, 14 Pick. 198, the transfer of choses in action as gifts *causa mortis* is discussed. "These cases," said Chief Justice Shaw, in delivering the opinion of the court, "all go on the assumption that a bond, note or other security is a valid subsisting obligation for the payment of a sum of money, and the gift is in effect a gift of the money, by a gift and delivery of the instrument which shows its existence and affords the means of reducing it to possession."

In the case at bar, the certificate was delivered as the language of the endorsement clearly shows, with no intention of a present gift of the money, with authority to the donee to reduce it to possession. On the contrary, the indorsement was of such a character as to absolutely prohibit the donee from claiming any present title to the money, or any right to reduce it to his possession during the life of the donor.

The decedent lived in Nicholas county, Kentucky, the place of his birth, until 1871, when he was sixty years old. He was married to Miss Hanby in 1832, with whom he lived thirty-six years, and by whom he had seven children, five of whom, one son and five daughters, grew up, married and settled near their parents. During these thirty-six years, by industry, economy and good judgment, an estate worth some $50,000 was accumulated. The evidence shows

that the decedent was an eccentric man, and his widow testified that he was always a hard man to get along with. In 1868 he seems to have become fascinated with a woman named Nancy Hyatt, with whom he established immoral relations, which fact became known to the public and his family. The wronged wife's remonstrances and entreaties were of no avail in winning back the faithless and unfeeling husband and father. Not content with the foul injustice already inflicted upon his family, he showed himself utterly insensible to every sentiment of affection and honor by publicly attacking the chastity of his wife, and denying the paternity of all but one of his children. It is not pretended that there was the slightest foundation for this monstrous slander, and naturally enough a separation ensued; when the property was divided by agreement, the wife and children getting the home farm, worth about $8,000. Previous to this strange infatuation with the Hyatt woman, the decedent had the respect aud esteem of his neighbors, and previous to that time the evidence fails to show that he was not attached to his family. Shortly after the separation and division of the property we find the decedent and Nancy Hyatt in Hancock County, Indiana, where, after a residence of four months, by a fraud on the jurisdiction of the court, he succeeded in having a decree of divorce entered in his favor, and straightway he and the Hyatt woman went through the formality of a marriage. Immediately after this the decedent and his pretended wife removed to Sumner County, Tennessee, and settled upon a farm, where they separated, after having lived together some two years.

The money on deposit, it is claimed, was given to the defendant Basket, a nephew, when no one was present but the alleged donor and donee, and the remainder of the defendant's estate all went to

other collateral relations. In such a contest it must not be thought strange if the donee is held to the strictest proof of his title. The outraged wife and children who had a natural claim upon the decedent's bounty will not appeal to a court of equity in vain, unless their adversary has established his right to the money in dispute by the most convincing testimony.

The allegation of mental unsoundness is not sustained by the evidence—it would be well for the memory of the decedent if it were.

These views render it unneccessary to consider other questions which were argued with ability by counsel on both sides.

Decree that the certificate of deposit be delivered to the complainant. and that the money evidenced by it be paid to him.